Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

KAREN JO BARROW,

Petitioner,

v.

GREENVILLE INDEPENDENT SCHOOL DISTRICT, ET AL.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

EDWIN MEESE III,
75th U.S. Attorney General
TODD F. GAZIANO
214 Massachusetts Ave., NE
Washington, D.C. 20002
(202) 608-6181

KELLY SHACKELFORD
Counsel of Record
HIRAM S. SASSER III
LIBERTY LEGAL INSTITUTE
903 E. 18th, Ste. 230
Plano, Texas 75074
(972) 423-3131

WM. CHARLES BUNDREN
WM. CHARLES BUNDREN & ASSOCIATES
5300 Town & Country Blvd.
Ste. 110
Frisco, Texas 75034
(972) 624-5338

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

In *Monell v. Dept. of Soc. Serv. of New York,* 436 U.S. 658, 694 (1978), this Court held that a government official is a policymaker if his "edicts or acts may fairly be said to represent official policy." In a published opinion, the Fifth Circuit, in agreement with the Fourth Circuit but in conflict with the Third, Sixth, Tenth and Eleventh Circuits, held that "a person is not a policymaker when he makes a decision simply because that decision is unreviewable." The question presented is:

If state law designates the Superintendent as the sole and final authorized decision maker regarding whom to recommend in the hiring process for a public school, and under state law the Superintendent's decision regarding whom to recommend is non-reviewable by the school board, is the Superintendent the policymaker for the school district on the question of whom to recommend?

Alternatively, is a government official a final policymaker for the government entity if his decision is not contrary to pre-established policy and is unreviewable or subject to meaningful review by any other person or governing body?

PARTIES

The parties to the proceeding below were:

Petitioner: Karen Jo Barrow, aligned as appellant below.

Respondent: Greenville Independent School District, aligned as appellee below.

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PETITION FOR A WRIT OF CERTIORARI

Karen Jo Barrow respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the Fifth Circuit, filed February 26, 2007, is reported at 480 F.3d 377. (App. 1). The amended judgment of the District Court for the Northern District of Texas Dallas Division, filed December 20, 2005, is reported at 2005 U.S. Dist. LEXIS 34557. (App. 12). The memorandum opinion and order of the District Court for the Northern District of Texas Dallas Division, filed August 5, 2005, is reported at 2005 U.S. Dist. LEXIS 16043. (App. 14). The memorandum opinion and order of the District Court for the Northern District of Texas Dallas Division, filed April 18, 2002, is reported at 2002 U.S. Dist. LEXIS 6785. (App. 87).[1]

JURISDICTION

The Judgment of the Fifth Circuit was entered February 26, 2007. (App. 1). The Fifth Circuit Court of Appeals ordered that the petition for rehearing en banc be denied

[1] The April 18, 2002 district court opinion is the relevant district court opinion for this cert. petition. *See* App. 87. The other opinions and orders are included to demonstrate when the right to the appeal accrued.

on April 12, 2007. (App. 13). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The TEX. EDUC. Code § 11.163(a)(1) provides that:

§ 11.163. EMPLOYMENT POLICY.

(a) The board of trustees of each independent school district shall adopt a policy providing for the employment and duties of district personnel. The employment policy must provide that:

> (1) the superintendent has sole authority to make recommendations to the board regarding the selection of all personnel other than the superintendent, except that the board may delegate final authority for those decisions to the superintendent;

The TEX. EDUC. Code § 11.201(a) provides that:

§ 11.201. SUPERINTENDENTS.

(a) The superintendent is the educational leader and the chief executive officer of the school district.

The TEX. EDUC. Code § 11.201(d) provides that:

(d) The duties of the superintendent include:

> (3) making recommendations regarding the selection of personnel of the district other than the superintendent, as provided by Section 11.163

STATEMENT OF THE CASE

At the encouragement of the principal of the Greenville Middle School, in July of 1998, Karen Jo Barrow ("Barrow"), a long-term and tenured teacher employed by the Greenville Independent School District ("GISD"), applied for a promotion to the position of Assistant Principal of Greenville Middle School. (App. 2). Barrow was certified for school administration and clearly qualified for the position. (App. 2).

At the direction and insistence of Dr. Herman Smith ("Smith"), Superintendent of Greenville Independent School District, an Assistant Superintendent for GISD asked Barrow if she would be willing to move her children from a private Christian school to public school so that she could be considered and interviewed for the job promotion. (App. 2). Barrow refused to sacrifice her children's private religious education in order to be considered for the promotion. (App. 2).

After Barrow's name was listed by the Superintendent's Council in a pool of applicants to be considered for interviews for the position, Smith directed and insisted that the Assistant Superintendent for Personnel, William Smith, approach Barrow to determine if she would be willing to move her children to the public schools so that he could interview her for the promotion. (App. 2). Barrow again refused to bargain her children's private religious education for the job promotion. Smith refused to recommend Barrow for the job promotion because she exercised her right to choose private religious education for her children. (App. 2). After another candidate was recommended and hired, Smith told Barrow and her husband that he did not recommend Barrow for the promotion because her children attended a private religious school.

Smith also stated that Barrow had "no future" at GISD while her children attended private school. (App. 2). Smith later told the candidate selected for the position that the only reason Barrow was not recommended was where she chose to educate her children. In a written response to the Equal Employment Opportunity Commission, GISD admitted that where Barrow chose to educate her children would be a factor in Smith's decision of whether to recommend Barrow for future promotions.

Barrow filed suit against GISD and Smith alleging, *inter alia*, that Smith violated Barrow's constitutional rights by refusing to recommend her for the promotion position solely because she chose private, religious education for her children. (App. 88-89). GISD moved for summary judgment, which the district court granted in-part and denied in-part. (App. 3). The district court granted GISD's summary judgment motion on Barrow's § 1983 claim, stating that Dr. Smith was not a "policymaker" for GISD, as he was instead only the "authorized decision maker." (App. 95-96).

Smith asserted qualified immunity as a defense to Barrow's parental right to direct the upbringing and education of her children and to the specific issue of whether it is lawful to deny a job promotion for a public school position because the applicant chose private education for her children. (App. 32-33). In a 3-0 published opinion, the Fifth Circuit denied Smith qualified immunity and held that it was clearly established law at the time Smith denied Barrow the recommendation that "public-school employees like Barrow have a protected right to educate their children in private school." *Barrow v. Greenville ISD*, 332 F.3d 844, 848 (5th Cir. 2003). (App. 33-34). After a trial, a jury rendered a verdict in favor of

Barrow against Smith, awarding both compensatory damages and punitive damages. (App. 12-13). Barrow appealed the district court's grant of summary judgment that Smith was not a "policymaker," as well as her disparate impact claim. (App. 4).

The Fifth Circuit affirmed the district court's ruling that Smith is not the "policymaker," despite the fact that under Texas State law Smith, as the Superintendent, was delegated the sole, final and unreviewable discretion to deny a recommendation to a job applicant seeking a promotion, and once his decision is made, the GISD school board lacks any authority to reverse the decision or influence Smith's recommendation in any way. TEX. EDUC. Code §§ 11.163(a)(1), 11.201(a), 11.201(d). (App. 1-2). The Fifth Circuit held that a final decisionmaker is not a final policymaker even if his decision is not contrary to any other existing policy and his decision is unreviewable. (App. 8).

REASONS FOR GRANTING THE PETITION

The Fifth Circuit has now taken the approach that government entities and school districts may escape liability for actions taken by final authorized decisionmakers when there is no meaningful review of their decisions by higher officials, or even if the decision is patently unreviewable. This position is in agreement with the Fourth Circuit's opinion just seven years ago in *Riddick v. School Bd.*, 238 F.3d 518 (4th Cir. 2000).[2] It is in stark disagreement with the Tenth and Eleventh Circuits

[2] Judge Luttig's dissent is enlightening on the subject of the effect of theoretical reviewability on the policymaker analysis.

and their requirement that there not only be reviewability, but "meaningful review." *See Randle v. City of Aurora*, 69 F.3d 441, 448-49 (10th Cir. 1995); *Holloman v. Harland*, 370 F.3d 1252, 1292 (11th Cir. 2004). The Third and Sixth Circuits hold that a government official's act binds the governmental entity, i.e. the government official is a policymaker, when the official's act is unreviewable. *See Kneipp v. Tedder*, 95 F.3d 1199, 1213 (3rd Cir. 1996); *Waters v. City of Morristown*, 242 F.3d 353, 362 (6th Cir. 2001).

This approach by the Fifth Circuit of allowing government to avoid its clear responsibility would encourage the flaunting of the rule of law, discourage representative democracy and encourage elected officials to do nothing when they see the Constitution being clearly violated by their highest and final decisionmakers. Indeed, elected officials would have every incentive to delegate decisions to bureaucrats and never adopt policies constraining them in any way. Attorneys would wisely advise their governmental body clients to avoid taking any position or passing any policy and, instead, allow final decisionmakers of the municipality to take action. Representative democracy would be greatly discouraged and the rule of law mocked. Responsibility could be easily avoided. Simply defer to the highest level official, take no position, and thus avoid any governmental accountability. Constitutional violation – Yes. Government accountability – No.

Finally, the Fifth Circuit's new approach is contrary to the Court's general principles regarding how to identify the final policymaker outlined by Justice O'Connor's plurality opinion in *City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988) as apparently adopted by a full majority of the Court in *Jett v. Dallas Ind. Sch. Dist.*, 491 U.S. 701 (1989). However, these general principles in the Court's

jurisprudence do not sufficiently guide the lower courts. The sheer volume of cases attempting to apply *Monell v. Dept. of Soc. Serv. of New York*, 436 U.S. 658 (1978), and its progeny, literally more than a thousand since the year 2000 according to a recent Lexis survey search, demand additional and specific guidance on this confusing and important issue.

I. There is a split among the circuits in their application of the *Praprotnik* plurality's guiding factor of whether the official's conduct or decision on a particular issue is subject to meaningful review.

When a plaintiff brings an action against the government for a constitutional violation perpetrated by a government official under 42 U.S.C. § 1983, there is no *respondeat superior* liability. *See Bryan Cty. v. Brown*, 520 U.S. 397, 403 (1997). Unless the government entity has adopted a specific policy that is the "moving force" of the official's action, the government entity is not liable for the conduct of the official. *See Pembaur v. City of Cincinnati*, 475 U.S. 469, 479-80 (1986) ("The 'official policy' requirement was intended to distinguish acts of the municipality from the acts of employees of the municipality"). There are four ways under *Monell* and its progeny for liability to attach to the government for the edicts and acts of a government official in the absence of an "official policy" – the government official is acting pursuant to a practice or custom,[3] the policymakers of the government entity are "deliberately indifferent,"[4] ratification of the official's

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[3] *See Bryan Cty. v. Brown*, 520 U.S. 397, 404 (1997).

[4] *City of Canton v. Harris*, 489 U.S. 378, 390 (1989).

conduct by the government policymakers,[5] or the government official is the final policymaker for that particular act or decision.[6] The question presented in this writ only concerns the latter – how to identify the final policymaker for a particular decision. *See Jett*, 491 U.S. at 737 (the task is to "identify those officials or governmental bodies who speak with final policymaking authority for the local government actor concerning the action alleged to have caused the particular constitutional or statutory violation at issue").

There are two guideposts provided by the Court in its most recent analysis of this issue in *McMillian v. Monroe County*, 520 U.S. 781, 785 (1997). First, there is no dispute that state law is the starting point of the analysis. *See id.*; *Praprotnik*, 485 U.S. at 124. The second guidepost is a matter of specificity – "whether governmental officials are final policymakers for the local government in a particular area, or on a particular issue." *Monroe County*, 520 U.S. at 785; *see also Jett*, 491 U.S. at 737 (courts must identify "those officials who have the power to make official policy on a particular issue"). The question in this case is whether an official is a final policymaker on a particular issue if his or her decision on a particular issue is unreviewable or not subject to meaningful review and does not conflict with any other existing policy.

So while these two guideposts provide some parameters, the specifics of the analysis are sometimes lost on courts.[7] There are two factors, however, that guide lower

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[5] *See St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988).

[6] *See id.*

[7] Indeed, lower courts face a "conundrum" in the "line drawing exercise" in determining who is the final policymaker because lower

(Continued on following page)

courts' analysis: (1) whether a subordinate's discretionary decisions are actually constrained by general policies enacted by others; and (2) whether the subordinate's specific decisions are reviewable by others. *See Praprotnik*, 485 U.S. at 127. The difficulty is that the circuits are split regarding the application of these additional guiding inquiries and this Court has yet to resolve the issue to give proper guidance to the lower courts.

A. In the present case, Texas law declares and the Fifth Circuit agreed the Superintendent is the sole and final decisionmaker regarding whom to recommend for hiring and his decision is unreviewable.

Under Texas State law, school boards are required to adopt a policy stating that the Superintendent – Smith – has "sole authority to make recommendations to the board regarding the selection of all personnel . . . " TEX. EDUC. Code § 11.163(a).[8] Under Texas law, the Superintendent is

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courts are caught between two competing principles. *Randle*, 69 F.3d at 448. First, courts cannot rely only upon the fact that an official has discretion on a particular issue to declare the official the final policymaker. Second, courts cannot reward elected officials who choose not to adopt policies to constrain the unlawful conduct of decisionmakers. *See id.*

[8] This is not a case of shared policymaking authority, which is certainly contemplated in this Court's jurisprudence. *Praprotnik*, 485 U.S. at 126 ("there will be cases in which policymaking responsibility is shared among more than one official or body"). Instead, this is a case about the Superintendent having sole, final and unreviewable authority to choose whom to recommend for hiring, for that particular position. *See Monroe County*, 520 U.S. at 785 ("whether governmental officials are final policymakers for the local government in a particular area, or on a particular issue."); *see also Jett*, 491 U.S. at 737 (court must identify "those officials who have the power to make official policy on a particular issue").

the "chief executive officer" of the school district and he is the only person ("sole authority") who can make promotion or hiring recommendations to the board of trustees. *Id.*; TEX. EDUC. Code § 11.201. A superintendent's denial of a recommendation, as occurred here, is final and unreviewable. (App. 8-9). GISD does not dispute that Smith's *denial* of the recommendation to Barrow was not subject to review by the GISD Board of Trustees, or anyone else, and the Fifth Circuit so held. (App. 6).

Under Texas law and GISD policy, in order for Barrow to receive the job promotion to school administrator, she was required to get Smith's "recommendation." Without the "recommendation" her quest for the promotion is ended. (TEX. EDUC. Code § 11.163(a) & (b)). Under Texas law, the Board of Trustees is prohibited from interfering with or directing the Superintendent regarding the decision of who to recommend. The Board of Trustees, under Texas State law, has the authority to prescriptively prohibit certain forms of discrimination. (TEX. EDUC. Code § 11.202(c)). In fact, the Board of Trustees adopted general policies regarding certain prohibited forms of discrimination. (App. 119). GISD took the position before the EEOC that Smith's discrimination against Barrow's choice of education for her children did not violate school district policy and indeed it was GISD's policy concerning the "needs of the district" that led Smith to use Barrow's educational choices for her children as a motivating factor regarding refusing her the "recommendation." (App. 119).

Of course, such discrimination violated Barrow's clearly established right. *See Barrow v. Greenville*, 332 F.3d 844, 848. Equally, GISD has never adopted a policy proscribing school patronage as an employment requirement, and could not, under Texas law, review Smith's clearly unlawful discriminatory decision. Indeed, a jury

punished Smith for his constitutional violation by awarding punitive damages in addition to the compensatory damage award. (App. 13).

In sum, Smith's clearly unconstitutional denial of a recommendation to Barrow was neither constrained by the policies of the GISD nor reviewable by the Board of Trustees. In fact, to this day, GISD still does not have a policy prohibiting discrimination based on patronage. In the Third, Sixth, Tenth, and Eleventh Circuits, Barrow's claim against GISD would succeed. In the Fifth and Fourth Circuits, Barrow GISD escapes liability because Smith is not a formal "policymaker."

B. The Fourth Circuit agrees with the Fifth Circuit in that theoretical review, whether or not actually exercised, is sufficient.

The Fourth Circuit's approach is very similar to the Fifth Circuit's approach in *Barrow*, and Judge Luttig's dissent from that approach casts light on the fallacy of such a position. In *Riddick v. School Bd.*, 238 F.3d 518, 523 (4th Cir. 2000), the court took a broad brush to the policymaker analysis. Just as the Fifth Circuit did in the present case, the Fourth Circuit did not view the Superintendent's official edict or act in isolation and ask the threshold question of whether the Superintendent was the official policymaker for that particular decision or act.[9] Instead, the Fourth Circuit held that because Virginia "vests control of the public school system in the local

[9] *See Jett*, 491 U.S. at 737 (the task is to "identify those officials or governmental bodies who speak with final policymaking authority for the local government actor concerning the action alleged to have caused the particular constitutional or statutory violation at issue").

school boards . . . [and] [t]his control includes the authority to supervise personnel," no other person within the district is a policymaker for the district. *Riddick*, 238 F.3d at 523. Judge Luttig criticized the holding "that no liability under section 1983 lies against the School Board for Crute's [track coach] conduct because – and merely because – the School Board formally retains review authority over all individual disciplinary decisions pursuant to state statute." *Id.* at 526 (Luttig, J., dissenting). Judge Luttig further stated:

> The majority's error, as I allude to above, is in its apparent failure to recognize that subordinate officials can be final policymakers, even absent a formal delegation of final decisionmaking authority from the principal: That is, the majority mistakenly concludes that a statutorily designated policymaker who retains but pro forma final review authority is, and can be, the only final policymaker for purposes of municipal liability under section 1983. This is simply not the case, however.

Id. at 527 (Luttig, J., dissenting). This is the error of the Fifth Circuit in *Barrow* as well.

In *Barrow*, the Fifth Circuit, like the Fourth Circuit, unflinchingly abandons required analysis of determining the identity of the policymaker on the specific issue of whom to recommend for hiring – "whether governmental officials are final policymakers for the local government in a particular area, or on a particular issue." *Monroe County*, 520 U.S. at 785; *see also Jett*, 491 U.S. at 737 (court must identify "those officials who have the power to make official policy on a particular issue"). Instead, the

Fifth and Fourth Circuits' rigid approach simply ignore the specific issue question and hold that because in general the final policymaking authority rests with the school board on employment issues and there is some theoretical level of review (Fourth Circuit) or the board has some theoretical ability to prescriptively restrain the Superintendent (Fifth Circuit), there is no government liability for the unlawful conduct of the highest ranking official of the school.

Such a holding is in direct conflict with the more specific and fact intensive "meaningful review" analysis of the Tenth and Eleventh Circuit. The Fourth Circuit conflicts directly with the meaningful review analysis of the Tenth and Eleventh Circuits and is just as strident in its dismissal of a single government official exercising final policymaking authority as the Fifth Circuit.

C. The Third and Sixth Circuits take the position that reviewability is outcome determinative.

In the Third Circuit, the threshold, and indeed determinative, question is "which official has final, unreviewable discretion to make a decision or take action." *Kneipp*, 95 F.3d at 1213; *Andrews v. Philadelphia*, 895 F.2d 1469, 1481 (3rd Cir. 1990). In *Andrews*, the Third Circuit further explained, quoting *Praprotnik*, that if there are policies that constrain the official that are not of that official's choosing, then the official's departure from those policies does not bind the local government. *Andrews*, 895 F.2d at 1481; *Praprotnik*, 485 U.S. at 127. This approach is simple, in conformance with Court precedent, and serves the public by requiring elected officials to properly restrain the acts of subordinate government officials by adopting specific policies.

Under the Third Circuit approach, Barrow would have prevailed at the summary judgment stage against GISD. There is no question that Smith's decision not to recommend Barrow for the job promotion was unreviewable. (App. 1-2). Further, there is no question that Smith's decision was *not* proscribed or restrained by any GISD policy. (App. 7).

In a similar vein, the Sixth Circuit holds "[t]he authority to exercise discretion while performing particular functions does not make a municipal employee a final policymaker unless *the official's decisions are final and unreviewable and are not constrained by the official policies of superior officials.*" *Waters v. City of Morristown*, 242 F.3d 353, 362 (6th Cir. 2001) (emphasis added). This is consistent with the two guiding factors from *Praprotnick* discussed above. 485 U.S. at 127. Again, Barrow would prevail in the Sixth Circuit, but not the Fifth.

In stark contrast to the simple two step inquiry of reviewability and whether the government official was actually restrained by policies not of his choosing, the Fifth Circuit held "a person is not a policymaker when he makes a decision simply because that decision is unreviewable." (App. 8-9). In addition, the Fifth Circuit allows theoretical prescriptive power to trump un-reviewability. (App. 8-9). Thus, under the Fifth Circuit's approach, in order to avoid legal accountability, school districts should never adopt any policies – at all. If there are no policies, then there can never be municipal liability under § 1983. In the Fifth Circuit, even the edicts and acts of sole and final decisionmakers, such as the school district's Superintendent, which are unreviewable by the school district's Board of Trustees, will never establish responsibility of the school under § 1983.

The Third and Sixth Circuits' approach requires elected official oversight, increases accountability for the governing bodies of local government, and reduces constitutional violations through policy enactment. The Fifth Circuit approach discourages elected officials from ever constraining the constitutional violations of their final decisionmakers, violates the most basic principles of government accountability and the rule of law, and would lead to an increase in government violations.

D. The Tenth and Eleventh Circuits take the position that meaningful review is necessary and formal review, even if possible, is not enough to shield the government from liability.

The Tenth Circuit goes further than the Third and Sixth in that even if there is formal or theoretical reviewability of an official's edict or act, that may not be enough to shield the municipality from liability. According to the Tenth Circuit, even theoretical review or the availability of review of a government official's decision is not determinative. *See Randle*, 69 F.3d at 449 (10th Cir. 1995) ("Nevertheless, our decisions also underscore that any review procedure or constraints must be *meaningful* – as opposed to merely hypothetical – in order to strip an official of 'final policymaking' authority") (emphasis in original); *Flanagan v. Munger*, 890 F.2d 1557, 1569 (10th Cir. 1989) ("For all intents and purposes the Chief's discipline decisions are final, and any meaningful administrative review [by the City Council or City Manager] is illusory.").

Under the Tenth Circuit approach, Barrow succeeds. Again, the Fifth Circuit agreed that Texas State law delegates sole and final authority regarding whom to

recommend for a promotion to the Superintendent. Under Texas State law, the Superintendent's decision regarding this specific issue – whom to recommend for promotion – is completely unreviewable. The Tenth Circuit's more liberal standard than the Third and Sixth Circuits' approach underscores the lack of uniformity across the federal circuits and the danger of such diverging views on government liability eroding the protection Congress intended when it enacted 42 U.S.C. § 1983.

The Eleventh Circuit's application of the "meaningful review" standard is on the far side of the spectrum from the Fifth Circuit's approach and clearly at odds with the Fifth Circuit's draconian application of *Monell* and its progeny. In *Holloman v. Harland*, 370 F.3d 1252, 1293 (11th Cir. 2004), a student sued a school district for the edicts and acts of the high school principal. In *Holloman*, under the local policies of the school district, the principal's disciplinary decisions were subject to review. In fact, the Eleventh Circuit had held in *Denno v. School Bd.*, 218 F.3d 1267, 1277 (11th Cir. 2000) that a principal was not the final policymaker for disciplinary issues because the school board had adopted a policy that allowed for formal administrative review concluding with the school board itself. Then, just four years later, the Eleventh Circuit in *Holloman* held a principal was the final policymaker regarding disciplinary issues even though the school district in *Holloman* had the same policy of review procedures as the school district in *Denno*. *See Holloman*, 370 F.3d at 1292.

The difference, according to the Eleventh Circuit, was that "meaningful review" is not formal or theoretical review. "Meaningful review" encompasses a broader consideration of the practicality of the review mechanism

in light of the special circumstances of the particular edict or act of the government official. In *Holloman*, the student suing the district had been first given detention and then received a paddling in lieu of the detention for raising his fist during the Pledge of Allegiance at school. *Id.* at 1261. There was a formal review process to appeal the punishment and clearly the student had the right to appeal and seek review of the principal's decision from the superintendent, and ultimately, the school board. The Fifth Circuit's analysis would have ceased at this point, and perhaps so too would have the Third and Sixth Circuits.

The Eleventh, however, went further. The Eleventh Circuit held that graduation was "barely a few days away" and that fact rendered the formal review process implemented by the Board of Trustees irrelevant. *Id.* at 1293. The review process provided by the school district, no matter how elaborate or detailed, no matter that it had been the law in the Eleventh Circuit that a principal was not a final policymaker with regard to student discipline because of an almost identical policy, was not "meaningful review" for purposes of the *Monell* analysis due to the short time constraint. *Id.* ("While the student handbook set out an [sic] formal multi-step appellate process that was theoretically available on paper, Holloman could not, as a practical matter, take advantage of it."). This standard is the most deferential standard for plaintiffs among the circuits because there is no certainty in the Eleventh Circuit regarding who is a policymaker because official policies restraining government actors adopted by the elected officials and formal review procedures formally adopted by the elected officials are not enough to shield the governmental entity in every circumstance.

This is an extreme conflict with the Fifth Circuit, which held that "a person is not a policymaker when he makes a decision simply because that decision is unreviewable." (App. 8-9). In fact, the Fifth Circuit would hold that the principal is not a policymaker even if there were no formal review procedures, but simply because the school board could, if it desired, adopt prescriptive policies to prohibit the constitutional violations involved in *Holloman* even if the school board refused in the past to ever pass such prescriptive policies or would ever exercise their power to do so in the future. This remarkable conflict deserves the Court's attention and the Court should grant the writ of certiorari and provide guidance to the lower courts and eliminate the growing disparity among the circuits on the correct application of this law.

II. This Court should resolve the split and bring clarity to this frequently litigated area of the law.

Congress, the collective representatives of the people of the nation, enacted 42 U.S.C. § 1983 to open federal courts to broad remedial relief for government deprivation of constitutional rights. Absolute immunity nullifies "*pro tanto* the very remedy it appears Congress sought to create." *Imbler v. Pachtman*, 424 U.S. 409, 434 (1976) (White, J., concurring in judgment). And that is exactly what the Fifth Circuit's opinion bestows on every district and government entity within the Circuit – absolute immunity from suit. If a school district or government entity wishes to avoid being held to answer for the constitutional violations, it has an easy remedy under the Fifth Circuit's novel approach – simply do nothing. If the elected officials do not pass any policies, then there will be no

means under the Fifth Circuit's approach for any person whose rights are violated to seek a judicial remedy. There is no policy for an aggrieved party to identify. The government official's decisions, even if final and unreviewable, will not bind the government entity because the elected officials could have passed a policy prohibiting the conduct in question even though they did not. There is every incentive now not to pass any policy.

If the school district's chief executive officer were to decide not to recommend any person of color or women for promotion, there would be no liability for the school district as long as the school district did not have any policies regarding such hiring practices. If the school district did not adopt a policy prohibiting racial or gender discrimination, but theoretically had the power to so enact a policy, the superintendent could blatantly discriminate in who he recommends for hiring and the school district board could avoid responsibility by sticking their heads in the sand.

And it is no fall-back argument that an aggrieved party could use deliberate indifference as a separate avenue of attaching liability to the school board for allowing the superintendent to engage in openly blatant racial and gender discrimination. The school board would only claim lack of power as Texas State law vests sole authority on whom to recommend with the school Superintendent. The school board could not review the decision even if they wanted to. The school board's only remedy is to pass a prescriptive policy prohibiting racial and gender discrimination in the employment process. But if the school board refuses to do so, the Fifth Circuit gives the school board a free pass because it theoretically could have passed such a policy. Again, why would the board pass a policy if passing

the policy is the only avenue to municipal liability? Under current Fifth Circuit precedent, it is far better for the school board to do nothing at all – giving it *de facto* absolute immunity.

The substantive issue at stake in this case is whether a school employee may choose private education for her children. A jury found Superintendent Smith so egregiously violated the law that he deserved punitive damages. (App. 14). The Fifth Circuit, in a separate opinion, held that the Superintendent violated a clearly established law and did not enjoy qualified immunity. *Barrow v. Greenville Indep. Sch. Dist.*, 332 F.3d 844 (5th Cir. 2003). (App. 4). Clearly established constitutional rights deserve protection and the government should have an incentive to adopt policies protecting those rights and restraining out of control government bureaucrats. The Rule of Law demands nothing less.

The Third, Sixth, Tenth and Eleventh Circuits support and enforce the Rule of Law. They require government entities to prescriptively enact policies to prohibit violations of clearly established law, especially in those circumstances where the state law delegates final and sole decisionmaking authority to a government official and that exercise of authority is unreviewable. To this day – nine years after the Superintendent Smith's Constitutional violation – GISD still does not have a policy prohibiting discrimination against those who educate their children in private schools and the Fifth Circuit's opinion in this case gives them no incentive to enact one.

CONCLUSION

Barrow's case would have been decided differently, and favorably, in at least four different circuits. This Court can and should clear up this conflict in the circuits, in an area of the law needing guidance, and protect the most basic principles of government accountability, the rule of law, and representative democracy.

For the foregoing reasons, Petitioners ask this Court to grant their Petition for a writ of certiorari.

Respectfully submitted,

EDWIN MEESE III,
75th U.S. Attorney General
TODD F. GAZIANO
214 Massachusetts Ave., NE
Washington, D.C. 20002
(202) 608-6181

KELLY SHACKELFORD
Counsel of Record
HIRAM S. SASSER III
LIBERTY LEGAL INSTITUTE
903 E. 18th, Ste. 230
Plano, Texas 75074
(972) 423-3131

WM. CHARLES BUNDREN
WM. CHARLES BUNDREN & ASSOCIATES
5300 Town & Country Blvd.
Ste. 110
Frisco, Texas 75034
(972) 624-5338

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 05-11151

KAREN JO BARROW,

Plaintiff-Appellant,

versus

GREENVILLE INDEPENDENT
SCHOOL DISTRICT; ET AL,

Defendants,

GREENVILLE INDEPENDENT
SCHOOL DISTRICT,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:00-CV-913

(Filed February 26, 2007)

Before JOLLY, HIGGINBOTHAM and DENNIS, Circuit Judges.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

The district court held that the superintendent of defendant Greenville Independent School District did not act as a policymaker for the district in refusing to recommend a teacher for promotion. Under Texas law, a school district's board of trustees can hire or promote only persons

recommended by the superintendent. Yet the Board has the power to hire and fire the superintendent. Concluding that under Texas law the Board retains the ultimate policymaking authority for hiring and promotion, we affirm.

I

Karen Jo Barrow was a teacher in the Greenville Independent School District. When the Assistant Principal position at Greenville Middle School became available, the future principal of the middle school encouraged Barrow to apply. Barrow was interested in and qualified for the position.

At the direction of Dr. Herman Smith, superintendent of GISD, a senior school official asked Barrow if she would move her children from a private Christian school to public school so that Barrow could be considered for the job. Barrow affirmed her interest in the job but stated she wouldn't sacrifice her childrens' religious education.

After Barrow's name was placed in the pool of applicants, Dr. Smith directed Assistant Superintendent for personnel, William Smith, to see if Barrow would be willing to move her children to public school. She was not, and another person was hired for the job. Later, Smith told Barrow and her husband that he didn't recommend Karen Jo for the job because her children went to private school; he also stated that Barrow had "no future" at GISD while that was the case.[1]

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[1] GISD disputes many of these facts, but on a motion for summary judgment we resolve disputed facts in favor of the non-moving party, here Barrow.

Barrow sued Smith and GISD in federal district court under § 1983, claiming a denial of constitutional rights, disparate impact and treatment in violation of Title VII, and several violations of state law. GISD moved for summary judgment, which the court granted in part and denied in part. Regarding § 1983, the court concluded that the GISD Board of Trustees, not Smith, was the policymaker because Smith only recommended candidates while the Board had final approval. The district court also held that the circumstance that the Board rubber-stamped Smith's recommendations was legally irrelevant and that a patronage requirement was not custom or practice establishing GISD policy. It denied summary judgment, however, finding that Barrow sufficiently alleged that GISD actually knew of Smith's behavior, knowledge it concluded was sufficient to establish GISD policy if proved.[2] The court granted summary judgment for GISD on the Title VII claims, except as to Barrow's reasonable accommodation claim,[3] concluding that the failure to promote was due to Barrow's choice to put her children in private school, not because of her religion or the religious nature of the private school she chose, and that Barrow presented no evidence of disparate impact upon constitutionally protected conduct. The court denied summary judgment on the state law claims, except as to the claim for injunctive relief.

The remaining claims were tried to a jury, which found against Smith[4] and for GISD, ordering Smith to pay

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[2] *See Bennett v. City of Slidell*, 728 F.2d 762 (5th Cir. 1984).

[3] GISD failed to move for summary judgment as to that claim.

[4] Early in the case, the district court granted summary judgment for Smith after concluding he had qualified immunity. Barrow appealed.

(Continued on following page)

Barrow about $35,000 in damages and $650,000 in fees and costs. All parties filed post-judgment motions, which the court denied. Barrow appeals the court's grant of summary judgment to GISD, contending that Superintendent Smith was a policymaker. She asks that we reverse and render judgment in her favor and against GISD given the jury finding that Smith violated her rights.[5] She also appeals the summary judgment granted to GISD on the Title VII claim of disparate impact.

II

A school district has no vicarious liability under § 1983. Rather, it is liable for the unconstitutional conduct of its policymakers, including persons to whom it has delegated policymaking authority in certain areas.[6] We review *de novo* the district court's conclusion that Smith was not such a policymaker here.[7]

We have examined before the policymaking authority of superintendents of independent school districts in Texas. In *Jett v. Dallas ISD*,[8] a school principal recommended to the

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GISD filed its motion for summary judgment, and the court ruled on the motion during Barrow's appeal. We reversed the court's grant to Smith of qualified immunity, *see Barrow v. Greenville Indep. Sch. Dist.*, 332 F.3d 844 (5th Cir. 2003), hence Smith re-entered the case and was a defendant at the trial of Barrow's remaining claims.

[5] In a footnote, GISD states that it does not concede a violation of Barrow's rights, but it makes no argument to the contrary. Because we affirm that Smith was not a policymaker, we do not address the argument.

[6] *See Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 689 (1978).

[7] *Baton Rouge Oil & Chem. Workers Union v. ExxonMobil Corp.*, 289 F.3d 373, 376 (5th Cir. 2002).

[8] 7 F.3d 1241 (5th Cir. 1993).

superintendent, who had final approval over the matter under ISD policy, that a teacher/coach be transferred. The superintendent approved and ordered the transfer, unaware of the principal's discriminatory motive. The Board played no role. The teacher sued the principal and the ISD, but not the superintendent, arguing that his involuntary transfer was motivated by race and his exercise of First Amendment rights. A jury awarded damages against the principal and the ISD. We reversed the judgment against the ISD for want of a finding that the superintendent had policymaking authority for his relevant conduct.[9] The Supreme Court granted certiorari to decide another issue, ultimately remanding for a determination of whether, under Texas law, the superintendent had "final policymaking authority in the area of employee transfers."[10]

The panel determined that, under Texas law, school boards make policy and superintendents administer. It pointed to Texas law giving the school board "*exclusive*

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[9] Jett never argued that the principal was a policymaker.

[10] The Supreme Court left the question to us:

> We decline to resolve this issue on the record before us. We think the Court of Appeals, whose expertise in interpreting Texas law is greater than our own, is in a better position to determine whether [the superintendent] possessed final policymaking authority in the area of employee transfers, and *if so* whether a new trial is required to determine the responsibility of the school district for the actions of Principal Todd in light of this determination. . . . We remand the case to the Court of Appeals for *it* to determine where final policymaking authority as to employee transfers lay in light of the principles enunciated by the plurality opinion in *Praprotnik* and outlined above . . . (emphasis added).

7 F.3d at 1244 (*citing Jett v. Dallas ISD*, 491 U.S. 701, 738 (1989)).

authority to manage and govern the public free schools of the district,"[11] concluding that the superintendent's power to decide transfers was entirely delegated by the board, hence the board had authority to modify or eliminate that power, rendering it the policymaker.[12]

Here, however, a Texas statute directs ISDs to adopt a personnel policy giving superintendents "sole authority to make recommendations to the board regarding the selection of all personnel, except that the board may delegate final authority for those decisions to the superintendent. . . . If the board rejects the superintendent's recommendation, the superintendent shall make alternative recommendations until the board accepts a recommendation."[13] Hence the superintendent's power to *recommend* comes from the legislature, not from the board of trustees, although the board retains the power to accept or reject those recommendations and to fire the superintendent. Barrow argues that this structure gives policymaking authority over personnel decisions to both the Board and Smith because both must agree on candidates – and both have effective veto power over the other's candidates.[14]

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[11] TEX. EDUC. CODE § 23.26 (repealed and reenacted as amended in 1999 as § 11.051) (emphasis added).

[12] The court also stated that "[n]othing in the Texas Education Code purports to give the Superintendent any policymaking authority or power to make rules or regulations, whether as to . . . transfers *or otherwise*" (emphasis added). Because the statutory question here is different from that in *Jett*, and because the situation in *Jett* did not require a ruling on the policymaking authority of superintendents in all instances, this statement does not dictate the result here.

[13] TEX. EDUC. CODE § 11.163(a)-(b).

[14] Barrow makes three other, meritless arguments which are conflated with her primary, strong argument. First, she argues that

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Standing alone, Barrow's argument has purchase because the superintendent has "sole authority" to recommend. But it cannot prevail against the backdrop of Texas's legislative scheme, which generally makes the board the policymaker and the superintendent the head administrator. Texas's system of bifurcating recommendation and approval authority over hiring and promotion neither gives the superintendent policymaking authority nor abrogates the board's general policymaking authority. Accenting this point in the matter of selecting school principals, the Texas legislature insists that the "board of trustees . . . shall adopt a policy for the selection of a campus principal that includes qualifications required for that position."[15] By its structure it is evident that the bifurcated system was calculated to insulate routine personnel decisions from direct meddling by elected board members, channeling board influence in such matters into the board's decision to hire or fire a superintendent and

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GISD's rubber-stamping of Smith's recommendations renders him the *de facto* policymaker. The district court properly rejected this argument because the question is whether GISD had the *authority* to guide Smith's discretion, not whether it actually did so. *See Jett*, 7 F.3d at 1247 n 10 (*citing City of St. Louis v. Praprotnik*, 485 U.S. 112, 129 (1988)). Second, she argues that GISD has a "custom and usage" of requiring teachers to put their children in public school. The district court rejected this argument for lack of evidence, and Barrow didn't appeal the ruling and does not now explain what sufficient evidence supports the claim. Third, Barrow briefly asserts that GISD is a policymaker for failing, to this day, to adopt a policy forbidding the superintendent from using the unlawful patronage practice. This turns *Monell* on its head. Although there is the argument that the absence of a policy may be actionable where the absence was intended by the municipality to avoid liability, *see Cornfield v. Consol. High Sch. Dist.*, 991 F.2d 1316, 1326 (7th Cir. 1993), there's no evidence of such intent here.

[15] TEX. EDUC. CODE § 11.202(c).

into its power to set standards for positions. The legislature accomplished this balance of its objectives by insisting that the board hire only persons recommended by a superintendent, whom it hires and fires. So fashioned, the legislation did not erode the policymaking authority of the board; it reinforced it, albeit with procedural traces for its exercise.

The statutory structure avoids the awkward scene of a superintendent advancing an unconstitutional personnel policy that the board has explicitly disavowed, leaving the board to protest liability for a policy that it has denounced. We need not search for evidence of such a risk of dueling, binding policies. There is a strong suggestion here that, to the extent there was a Board policy, it opposed patronage.[16] That escape from such a scene is offered by the power of the board to fire the superintendent highlights that it is the board, not the superintendent, which has policymaking authority.

This statutory structure is cemented by caselaw. As *Jett* emphasized, an official whose discretionary decisions on a particular matter are final and unreviewable,[17]

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[16] The Board had informally discussed and rejected a patronage policy during a public budget meeting. Moreover, the Board had a general anti-discrimination policy which mirrored broad constitutional requirements (e.g., no discrimination based on race, religion, or national origin), although it didn't explicitly mention the right at issue here.

[17] This court in *Beattie v. Madison County School District*, 254 F.3d 595, 603 (5th Cir. 2001), characterized *Jett* as holding that "a superintendent's transfer of a teacher to another position might be a final policy decision if that action was unreviewable, even if the superintendent did not have complete control over the hiring and firing of district personnel." "Might be" does not mean "is," and a person is not a

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meaning they can't be overturned, is constrained if another entity has ultimate power to guide that discretion, at least prescriptively, whether or not that power is exercised.[18] In *Auriemma v. Rice*,[19] cited by *Jett*, the Seventh Circuit concluded that the Chicago Police Chief, who by city ordinance had unreviewable discretion to make personnel decisions, would not have set city policy in allegedly discriminating by race. Rather, the Chief would have *violated* city policy, embodied in another city council ordinance generally forbidding racial discrimination in hiring.

We AFFIRM the district court's grant of summary judgment to GISD on Barrow's § 1983 claim.

III

The district court granted summary judgment to GISD on Barrow's claim that the patronage policy operated more harshly on people patronizing private school for religious belief than people opting for private schooling for other reasons. The court explained:

> To establish a prima facie case of disparate impact, Barrow must show that facially neutral employment standards operate more harshly on one group than another. This initial burden includes proof of a specific practice or set of practices resulting in a significant disparity between the groups. Statistical disparities between the

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policymaker when he makes a decision simply because that decision is unreviewable.

[18] *See Jett*, 7 F.3d at 1247.

[19] 957 F.2d 397 (7th Cir. 1992).

> relevant groups are not sufficient. A plaintiff must offer evidence 'isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities.'
>
> Barrow has not furnished evidence of any observed statistical disparities caused by GISD's [alleged practice]. At most, she has adduced evidence that this requirement was applied to her twice, and to Pope once. In response, GISD has introduced evidence that while employed by GISD, Assistant Superintendent Mike Cardwell . . . educated his children for twelve years in [the same school as Barrow's children], and during that time was promoted to Assistant Superintendent. . . . Taken as a whole, the evidence on which Barrow relies does not satisfy her initial burden of proving that GISD's employment practices have resulted in a significant disparity between Christian and non-Christians, or religious believers and non-believers.

The record evidence, read in the light most favorable to Barrow, supports the district court's conclusion that Smith did not recommend Barrow because her children were not attending the public schools, not because her children were attending a religious school. There is no probative evidence that Smith's decision had any impact upon any First Amendment-protected freedom.[20]

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[20] She also argues that GISD did not, in its motion for summary judgment, argue anything about lack of evidence of disparate impact. That is wrong; in any event, we can affirm the district court's independent conclusion based on the record.

We AFFIRM the district court's grant of summary judgment to GISD on the Title VII disparate impact claim.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

KAREN JO BARROW, Plaintiff,	§	
VS.	§	Civil Action No.
GREENVILLE INDEPENDENT SCHOOL DISTRICT, et al.,	§	3:00-CV-0913-D
Defendants.	§	

AMENDED JUDGMENT

(Filed Dec. 20, 2005)

The court filed memorandum opinions and orders granting in part and denying in part a motion to dismiss and motions for summary judgment filed by defendants Greenville Independent School District ("GISD") and Dr. Herman Smith ("Dr. Smith"). Thereafter, the parties tried this case to a jury, which returned a verdict partially in favor of plaintiff Karen Jo Barrow ("Barrow"), partially in favor of Dr. Smith, and in favor of GISD. In memorandum opinions and orders filed August 5, 2005 and today, the court granted in part and denied in part Barrow's motion to alter or amend the judgment.

For the reasons set out in memorandum opinions and orders filed July 14, 2000, April 18, 2002, January 7, 2005, August 5, 2005, and today, and based on the jury verdict, it is ordered and adjudged that Barrow recover judgment from Dr. Smith in the principal sum of $15,455.00 for compensatory damages, together with prejudgment interest thereon at the rate of 3.31% per annum simple interest, which does not compound, from May 1, 2000 to

March 24, 2005, and post-judgment interest thereon at the rate of 3.31% per annum. It is further ordered and adjudged that Barrow recover judgment from Dr. Smith in the principal sum of $20,000.00 for punitive damages, together with post-judgment interest thereon at the rate of 3.31% per annum. It is further ordered and adjudged that Barrow recover judgment from Dr. Smith for attorney's fees in the sum of $631,293.00, and for expenses and taxable costs of court in the sum of $22,775.22, together with post-judgment interest thereon at the rate of 3.31% per annum.

Barrow's action against GISD is dismissed with prejudice, and all relief that she seeks against GISD is denied. GISD's taxable costs of court in the sum of $14,492.65 are assessed against Barrow.

All relief that any party seeks in this lawsuit that is not awarded by this amended judgment is hereby denied.

Done at Dallas, Texas December 20, 2005.

/s/ Sidney A. Fitzwater
SIDNEY A. FITZWATER
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

KAREN JO BARROW,	§	
	§	
Plaintiff,	§	
	§	
VS.	§	Civil Action
	§	No. 3:00-CV-0913-D
GREENVILLE INDEPENDENT SCHOOL DISTRICT, et al.,	§	
	§	
	§	
Defendants.	§	

MEMORANDUM OPINION AND ORDER

(Filed Aug. 5, 2005)

The parties tried this case to a jury, which returned a verdict in favor of plaintiff Karen Jo Barrow ("Barrow") and against defendant Dr. Herman Smith ("Dr. Smith") for $15,455.00 in compensatory damages and $20,000 in punitive damages, finding, *inter alia,* that Barrow had proved her parental rights claim. The jury found against Barrow as to her claims against defendant Greenville Independent School District ("GISD").[1] The court entered judgment, and all parties have filed post-judgment motions,[2] most of which the court decides today and some of

[1] The court has addressed the background facts and procedural history of this case in several prior opinions and will not do so in today's decision. It will instead do so as necessary below, in the context of addressing the dispositive issues that the motions present. The court assumes the parties' familiarity with the facts and procedural history.

[2] The following motions are the subject of this memorandum opinion and order: (1) GISD's April 6, 2005 motion for attorney's fees; Dr. Smith's April 8, 2005 motions (2) for new trial, (3) for judgment as a matter of law, (4) to alter or amend judgment, and (5) for attorney's

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which – those that are affected by whether (or to what extent) Barrow is entitled to recover attorney's fees and costs – the court defers to consider additional submissions.

I

Both Barrow and Dr. Smith assert in their post-trial motions various arguments that depend explicitly on the jury's finding that Dr. Smith is liable to Barrow on her parental rights claim but not on her religious rights claim. The court will consider the arguments together.

A

In the court's charge, it instructed the jury that "[p]ublic school employees have rights protected under the Constitution of the United States to choose to educate their children in private school, including a private school that provides a religious education." Ct. Charge at 7. The court explained that public school employees "have parental rights under the First and Fourteenth Amendments to direct their children's educations, and they have the right under the Free Exercise Clause of the First Amendment to freely exercise their religious faith by choosing to educate their children in a religious educational institution." *Id.* It also instructed the jury that Barrow did not "have to prove that any action taken against her was because of her

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fees; (6) Barrow's April 11, 2005 preliminary motion for attorney's fees and (7) post-trial motion to alter or amend judgment and for judgment as a matter of law; and (8) Barrow's May 5, 2005 request for *Dondi* conference. Also pending for decision is Barrow's April 13, 2005 objections to GISD's bill of costs. The court will defer deciding the objections.

religion." *Id.* In asking the jury to determine whether Barrow had proved her "parental and/or religious rights claim" against Dr. Smith, the court directed the jury to make separate findings on Barrow's parental rights claim and religious rights claim. *Id.* at 11. The jury found that Barrow had proved her parental rights, but not her religious rights, claim.

Barrow argues in her motion to alter or amend judgment and motion for judgment as a matter of law that she is entitled to judgment on her religious rights claim. She maintains that the jury found that the exercise of her parental right to choose a private school for her children was a motivating factor in Dr. Smith's decision not to interview or promote her, and that having reached this conclusion, the only way the jury could have come to a different result on her religious rights claim would be if it concluded that her decision was not made based on her religious faith. Barrow posits that the evidence was undisputed that her decision to choose the Greenville Christian School for her children was an exercise of her religious faith. She urges that the judgment be modified to reflect that Dr. Smith violated both her parental and religious rights, arguing that her exercise of this legal right was one and the same.

Dr. Smith maintains in his motion to alter or amend judgment that, because the jury denied what he calls Barrow's "Free Exercise claim," his conduct is subject to rational basis scrutiny, which obligated Barrow to prove that the restriction at issue here – conditioning her employment on the enrollment of her children in public school – was not reasonable. He argues that, under rational basis review, his conduct was permissible, and that

he is therefore entitled to judgment as a matter of law on Barrow's parental rights claim.

B

Dr. Smith's position is premised on two separate arguments. First, he posits that the Fifth Circuit's decision in *Barrow v. Greenville Independent School District,* 332 F.3d 844 (5th Cir.) ("*Barrow*"), *cert. denied,* 540 U.S. 1005 (2003), can be read to call for a heightened level of scrutiny concerning Barrow's claim. He argues, however, that if *Barrow* subjects claims that involve solely parental rights to a heightened level of scrutiny, it would conflict with *Littlefield v. Forney Independent School District,* 268 F.3d 275 (5th Cir. 2001). In *Littlefield* the panel applied a rational basis test in upholding a school district's mandatory dress code against claims by parents that the code violated "their 'fundamental right' to control the upbringing and education of their children." *Id.* at 282, 288, 291. Dr. Smith posits there is no conflict between *Barrow* and *Littlefield* because, in *Barrow,* the court noted that a violation of the Free Exercise Clause was also alleged. Citing the Supreme Court's decision in *Employment Division, Department of Human Resources of Oregon v. Smith,* 494 U.S. 872 (1990), Dr. Smith argues that, if a claim involves both a violation of a parent's right to direct the education of her children and the parent's free exercise rights, it could be referred to as a "hybrid rights" claim and might be entitled to a heightened level of scrutiny. *See id.* at 881 (noting that "[t]he only decisions in which [the Court has] held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction

with other constitutional protections, such as freedom of speech and of the press[.]"). Dr. Smith argues that because the jury rejected Barrow's "Free Exercise claim," she does not have a "hybrid rights" claim and therefore is not entitled to the heightened level of scrutiny the Fifth Circuit arguably applied in *Barrow*.

Alternatively, Dr. Smith maintains that rational basis scrutiny is appropriate even if Barrow's claims can be categorized as "hybrid rights" claims. He argues that *Barrow* is not binding as to the appropriate level of scrutiny because the panel specifically limited its holding to whether there is a "recognized constitutional right," *Barrow,* 332 F.3d at 847, and it specifically noted that it was not addressing the question of the appropriate level of scrutiny. Dr. Smith also points to Judge Maloney's decision in *Littlefield v. Forney Independent School District,* 108 F.Supp.2d 681 (N.D. Tex. 2000), *aff'd,* 268 F.3d 275 (5th Cir. 2001), in which he declined to apply heightened scrutiny in a case that presented a "hybrid rights" situation, where the plaintiffs asserted not only a violation of their parental rights but also their rights under the Free Exercise Clause. *See Littlefield,* 108 F.Supp.2d at 689, 706-07. In doing so, the court contrasted the claims at issue in the case before it from those in *Wisconsin v. Yoder,* 406 U.S. 205 (1972), recognizing that in *Yoder* the Court "observed that there was 'strong evidence' in the record of a 'sustained faith pervading and regulating respondents' entire mode of life,'" and that "[i]n the *Yoder* Court's mind, the Amish parents had made a 'convincing showing, one that probably few other religious groups or sects could make[.]'" *Id.* at 706-07 (quoting *Yoder,* 406 U.S. at 219, 235-36). Dr. Smith argues that Barrow did not have a high

level of evidentiary support and that she in fact lost on her "Free Exercise claim."

A brief overview of the procedural history of the instant case helps explain why the court declines to accept Barrow's and Dr. Smith's arguments. As the Fifth Circuit recognized in *Barrow,*

> [i]n her [first amended complaint], Barrow argued that Smith violated her right to select a private-school education for her children as guaranteed by the First Amendment and "the penumbra of familial privacy rights" (count I); her right under the Due Process Clause of the Fourteenth Amendment to direct the upbringing of her children (count II); and her right under the Free Exercise Clause of the First Amendment to provide a religious education for her children (count III).

Barrow, 332 F.3d at 846-47 (emphasis omitted). In his motion for summary judgment based on qualified immunity, Dr. Smith argued that Barrow could not establish that she was discriminated against on the basis of her religious beliefs. In her response, Barrow maintained that her rights to the free exercise of her religion were clearly established in July 1998. As part of her argument, Barrow quoted the Supreme Court's decision in *Employment Division* in advancing the contention that "when the 'Free Exercise Clause [is viewed] in conjunction with other constitutional protections,' then, in those situations 'the First Amendment bars application of a neutral, generally applicable law to religiously motivated action.'" P. Resp. Br. at 30-31 (quoting *Employment Div.,* 494 U.S. at 881). She asserted that, "[i]n these types of 'hybrid' cases, the Supreme Court in [*Employment Division*] reaffirmed the

applicability of the First Amendment's bar to a neutral law of general applicability which had the effect of burdening religiously motivated actions." *Id.* at 31. Apparently advocating the application of strict scrutiny to Dr. Smith's conduct, Barrow argued that he did not advance a compelling state interest in his brief, and she contended that his failure to do so "doom[ed]" his argument that there was no "religious discrimination." *Id.*

In deciding Dr. Smith's motion for summary judgment, the court considered Barrow's free exercise claim separately from her parental rights claim. It concluded that "Dr. Smith's school attendance requirement constituted a neutral, generally applicable regulation that was not enacted to inhibit a particular faith or religion in general[,]" and that, as a result, "it 'will withstand a free exercise challenge when the regulation is reasonably related to a legitimate state interest.'" *Barrow v. Greenville Indep. Sch. Dist.,* 2002 WL 255484, at *4 (N.D. Tex. Feb. 20, 2002) (Fitzwater, J.) ("*Barrow I*"), *rev'd,* 332 F.3d 844 (5th Cir.), *cert. denied,* 540 U.S. 1005 (2003).

Although this court dealt with Barrow's free exercise claim separately, the Fifth Circuit in *Barrow* did not. As mentioned above, the panel noted Barrow's separate counts in her amended complaint, but it considered the three claims in tandem, observing that "at bottom all aver that Barrow, a public-school employee, has a constitutionally-protected right to select a private-school education for her children." *Barrow,* 332 F.3d at 847. The panel explained that its "inquiry at this stage is limited to the question whether there is a recognized constitutional right and not whether that right is grounded in the First Amendment, the Fourteenth Amendment, or both." *Id.* Relying on its decisions in *Brantley v. Surles,* 718 F.2d

1354 (5th Cir. 1983), and *Fyfe v. Curlee,* 902 F.2d 401 (5th Cir. 1990), the panel held that "the constitutional right of public-school employees to select a private-school education for their children was clearly established when Smith refused to consider Barrow for the position of assistant principal." *Id.* at 848.

It is evident from Dr. Smith's arguments in his motion to alter or amend judgment that he is mistaken concerning the nature of Barrow's religious rights claim that the court submitted to the jury. He sees it as a form of stand-alone free exercise claim. Instead, the court viewed the First Amendment Free Exercise Clause as but one of two constitutional predicates (the other being the parental rights guaranteed by the First and Fourteenth Amendments) for the right articulated in *Barrow* of a public school employee to select a private school education for her children. Although the court separated these predicates in the jury charge and gave them the labels "Parental Rights Claim" and "Religious Rights Claim," it followed this approach to give effect to the principle set out in cases like *P & L Contractors, Inc. v. American Norit Co.,* 5 F.3d 133 (5th Cir. 1993). *See id.* at 138 ("Where the law recognizes alternative or overlapping theories of recovery, the court must properly condition the interrogatories to minimize the possibility of conflicting or overlapping verdicts.") (citing John R. Brown, *Federal Special Verdicts: The Doubt Eliminator,* 44 F.R.D. 338, 340 (1969)). Under the Fifth Circuit's decision in *Barrow,* a finding in Barrow's favor on either predicate is sufficient to establish that Dr. Smith violated the right that the panel identified was clearly established at the time of Dr. Smith's decision: her right, as a public school employee, to select a private school education for her children. Had the court intended to

submit an independent free exercise claim, it would have instructed the jury on the law that pertained to such a claim, including the appropriate level of scrutiny to apply to Dr. Smith's conduct. This would have required the court to determine, as did the *Littlefield* court, whether to apply a "hybrid rights" theory to her free exercise claim, resulting either in the application of strict scrutiny or rational basis review. Such a determination was unnecessary, however, because the court did not submit an independent free exercise claim to the jury. The court decided that, because the Fifth Circuit's *Barrow* opinion made clear that Dr. Smith was not entitled to qualified immunity concerning Barrow's parental rights claim as a public school employee (with its two constitutional origins), it would submit that claim to the jury. If Barrow could prove the claim, it would provide her the relief she sought under 42 U.S.C. § 1983, without requiring that the trial exceed the scope of the qualified immunity issue that the Fifth Circuit had already resolved. From the standpoint of judicial efficiency, it was unnecessary to complicate the trial with other claims and defenses that, even if resolved in Barrow's favor, would not afford her any greater relief than her parental rights action would provide.

C

In view of the foregoing, the court also denies Barrow's motion that it modify the judgment to reflect a finding of liability on Barrow's religious rights claim. First, the judgment itself need not be altered or amended because it says nothing about the basis for entering judgment, and no changes need be made to the relief granted by the judgment. Second, the court need not do so because the jury ruled in Barrow's favor concerning the right that

was at issue after the Fifth Circuit's qualified immunity decision – her right, as a public school employee, to choose a private school education for her children. Her "religious rights," as protected by the First Amendment Free Exercise Clause, served as one predicate for that right.[3]

Dr. Smith attempts in his motion to alter or amend judgment to shift the burden to Barrow of showing that the patronage policy was unreasonable. This effort is precluded, however, by the Fifth Circuit's decision in *Barrow,* which is the law of the case. Although the panel stated that it was expressing "no opinion on the particular degree of scrutiny a state action must undergo to withstand a challenge to its constitutionality in a case like this one," it explicitly recognized "that the state cannot strip its school employees of the right to choose a private-school education for their children without proving that the unfettered exercise of this right will undermine a state interest." *Barrow,* 332 F.3d at 849 n.20. *Barrow* placed the burden squarely on Dr. Smith to show that his actions were not unreasonable. Recognizing that its decisions in *Brantley* and *Fyfe* "leave no doubt that public-school employees like Barrow have a protected right to educate their children in private school," the panel explained that "[t]he state cannot take an adverse employment action against a public-school employee for exercising this right unless it can prove that the employee's selection of private

[3] Because the court declines to alter or amend the judgment to reflect a finding for Barrow on her religious rights claim, the court need not address Dr. Smith's and GISD's arguments in their responses to her motion to alter or amend judgment and judgment as a matter of law that Barrow is not entitled to judgment on her religious rights claim pursuant to Fed. R. Civ. P. 59(e) because it is not a proper avenue for determining evidentiary sufficiency.

school materially and substantially affects the state's educational mission." *Id.* at 848.[4] The requirement that the state make such a showing does not appear to be dependent on the existence of a "hybrid right." The court in *Fyfe* required the government to make such a showing even though no religious rights were at issue. *See Fyfe,* 902 F.2d at 405 ("Because the school district produced no evidence of substantial interference with its effectiveness as a result of Mrs. Fyfe's enrollment of her daughter in private school, Mrs. Fyfe must prevail as a matter of law."). Accordingly, the court holds that Dr. Smith had the burden to show that his actions were justified, and that the placement of this burden on him is unaffected by the jury's determination as to Barrow's religious rights claim.

Accordingly, neither Dr. Smith nor Barrow is entitled to relief on the grounds asserted.

II

The court now addresses the additional arguments that Barrow raises in her motion to alter or amend judgment and motion for judgment as a matter of law.

The court is authorized to alter or amend judgment under Fed. R. Civ. P. 59(e) "to correct a clear error of law or prevent manifest injustice." *United States ex rel. Becker v. Westinghouse Savannah River Co.,* 305 F.3d 284, 290 (5th

[4] In her response to Dr. Smith's motion, Barrow equates the standard that the *Barrow* panel articulated with the application of strict scrutiny. Like *Barrow,* this court need not specify the level of scrutiny applicable in this case. It is sufficient to say that *Barrow* held that Dr. Smith had the burden of showing material and substantial impairment.

Cir. 2002) (quoting *Pac. Ins. Co. v. Am. Nat'l Fire Ins. Co.*, 148 F.3d 396, 403 (4th Cir. 1998)). "A court may enter judgment as a matter of law under Rule 50 only where there exists 'no legally sufficient evidentiary basis for a reasonable jury to find' otherwise." *Gaia Techs., Inc. v. Recycled Prods. Corp.*, 175 F.3d 365, 371 (5th Cir. 1999) (quoting Rule 50(a)(1)).[5]

A

Barrow argues that the judgment should be altered to reflect that GISD is liable to her under § 1983. Reasserting an argument that she has advanced unsuccessfully before, Barrow essentially posits that because Dr. Smith was the final decisionmaker concerning whom to interview and recommend for promotion, his decision to deny her an interview should be imputed to GISD. She maintains that the undisputed evidence at trial established that GISD delegated to Dr. Smith final decisionmaking authority to decide whom to interview and recommend for promotion.

As a basis for her argument, Barrow again attempts to rely on *Coggin v. Longview Independent School District*, 289 F.3d 326 (5th Cir. 2002), *vacated pending en banc review*, 309 F.3d 307 (5th Cir. 2002) (en banc). She persists in citing and discussing the *Coggin* panel opinion as if it were binding Fifth Circuit authority. During the trial, although the court had no occasion to announce that it was

[5] Although Dr. Smith and GISD argue in their responses to Barrow's motion that she has waived any challenge under Rule 50 because she did not urge her arguments at trial, the court need not address this contention. As the court will explain, the arguments Barrow asserts that are appropriate for a motion for judgment as a matter of law fail for other reasons.

doing so, it declined to rely on Barrow's arguments to the extent based on the *Coggin* panel opinion. Because Barrow continues to cite the panel opinion as if it were controlling – in fact, she mistakenly asserts that "[t]he panel decision in *Coggin* was affirmed *en banc* by the Fifth Circuit," P. Mot. at 8 – the court now addresses whether the panel opinion is binding on this court.

It is well settled that, when the Fifth Circuit grants rehearing *en banc,* the panel opinion is vacated and has no precedential value. 5th Cir. R. 41.3 provides: "[u]nless otherwise expressly provided, the granting of a rehearing en banc vacates the panel opinion and judgment of the court and stays the mandate." *See, e.g., Soffar v. Cockrell,* 300 F.3d 588, 590 (5th Cir. 2002) (en banc) ("We granted rehearing en banc, thereby vacating the panel opinion." (citing Rule 41.3)); *United States v. Pineda-Ortuno,* 952 F.2d 98, 102 (5th Cir. 1992) (observing that rehearing en banc had been granted in cited case and that, as a result, "the panel decision is vacated and of no precedential value." (citing Rule 41.3)). There is nothing in the court's order in *Coggin* granting rehearing *en banc* that indicates that the Fifth Circuit did not intend for the rule to apply. *See Coggin,* 309 F.3d at 308.

Nor is Barrow correct in asserting that the *en banc* Fifth Circuit "affirmed" the panel opinion. The *en banc* Fifth Circuit sometimes reinstates a panel opinion, in whole or in part, but when it does, it does so explicitly. *See, e.g., United States v. Herrera,* 313 F.3d 882, 885 (5th Cir. 2002) (en banc) (per curiam) ("[T]he applicable portions of the panel opinion are reinstated." (citation omitted)); *Soffar,* 300 F.3d at 590 ("We reinstate the rulings of the panel concerning the grant or denial of COA as to all issues raised by Soffar."). The *en banc Coggin* court neither

explicitly reinstated the panel opinion nor "affirmed" the panel. Nowhere in the *en banc* opinion is there any explicit reinstatement of any part of the panel opinion. And while the *en banc* court did affirm, it "affirm[ed] *the judgment of the district court.*" *Coggin v. Longview Indep. Sch. Dist.*, 337 F.3d 459, 460 (5th Cir. 2003) (en banc) (emphasis added); *see also id.* at 466 ("[W]e AFFIRM *the judgment of the district court.*" (emphasis added)). Accordingly, even if the panel opinion in *Coggin* supports Barrow's argument, which the court need not decide, it is not binding on this court.

With the *Coggin* panel opinion placed in its proper non-precedential context, the court now addresses Barrow's argument, concluding that it lacks merit under established Supreme Court precedent and the law of this circuit. For purposes of attaching § 1983 liability to a governmental entity based on the actions of an employee, there is an important distinction to be drawn between those instances where the employee acts as a policymaker as those where he acts simply as a decisionmaker. *See, e.g., Rivera v. Houston Indep. Sch. Dist.*, 349 F.3d 244, 247-48 (5th Cir. 2003) (recognizing that "[m]unicipal liability under 42 U.S.C. § 1983 requires proof of . . . a policymaker," and observing that a "delegation of decisionmaking authority [under a particular provision of the Texas Education Code] does not negate the fact that . . . final policymaking authority lies exclusively with the Board."); *Jett v. Dallas Indep. Sch. Dist.*, 7 F.3d 1241, 1246 (5th Cir. 1993) (noting that the Supreme Court in *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986), and *City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988), "distinguished between those having mere *decisionmaking* authority and those having *policymaking* authority."

(emphasis in original)). In *Pembaur* the Supreme Court recognized

> that not every decision by municipal officers automatically subjects the municipality to § 1983 liability. Municipal liability attaches only where the decisionmaker possesses final authority to establish municipal policy with respect to the action ordered. The fact that a particular official – even a policymaking official – has discretion in the exercise of particular functions does not, without more, give rise to municipal liability based on an exercise of that discretion. The official must also be responsible for establishing final government policy respecting such activity before the municipality can be held liable. Authority to make municipal policy may be granted directly by a legislative enactment or may be delegated by an official who possesses such authority, and of course, whether an official had final policymaking authority is a question of state law.

Pembaur, 475 U.S. at 481-83 (footnotes and citation omitted).

The *Jett* court relied on *Pembaur* in reaching its decision. *See Jett,* 7 F.3d at 1246-47. In *Jett* a high school teacher and coach brought a § 1983 action against the district that employed him when the district Superintendent ordered him transferred to a school where his position would not involve coaching duties. *Id.* at 1242-43. The plaintiff alleged that, before the Superintendent approved the recommendation, he informed him that his Principal's transfer recommendation, on which the transfer was based, was racially motivated. *Id.* at 1243. The court noted that the school district Board of Trustees took no action

regarding the transfer. *Id.* The plaintiff in *Jett* argued that the district Trustees "had delegated final policymaking authority as to employee transfers" to the Superintendent and pointed to evidence that supported the conclusion that the Superintendent was the final decisionmaker regarding the transfer. *Id.* at 1246. The court observed, however, that the fact "that [the Superintendent] may have been delegated the final decision in the cases of protested individual employee transfers does not mean that he had or had been delegated the status of policymaker, much less final policymaker, respecting employee transfers." *Id.* The court ultimately held that the evidence was "not sufficient to support a finding that [the Superintendent] possessed final policymaking authority in the area of employee transfers," and that, under Texas law, such authority was vested in the district's trustees, and there was "no evidence they had delegated it to [the Superintendent]." *Id.* at 1251. An example from *Pembaur* that the *Jett* court quoted also helps to explain why Barrow's argument is insufficient to establish that GISD is liable under § 1983. In *Pembaur* the Supreme Court explained that

> the County Sheriff may have discretion to hire and fire employees without also being the county official responsible for establishing county employment policy. If this were the case, the Sheriff's decisions respecting employment would not give rise to municipal liability, although similar decisions with respect to law enforcement practices, over which the Sheriff is the official policymaker, would give rise to municipal liability. Instead, if county employment policy was set by the Board of County Commissioners, only that body's decisions would provide a basis for county liability.

Pembaur, 475 U.S. at 484 n.12 (emphasis omitted), *quoted in Jett,* 7 F.3d at 1247.

This court held in deciding GISD's motion for summary judgment that "under the revised Texas Education Code, the GISD Board – not the Superintendent – establishes policy concerning the eligibility requirements for a person to be interviewed for an administrator position." *Barrow v. Greenville Indep. Sch. Dist.,* 2002 WL 628665, at *3 (N.D. Tex. Apr. 18, 2002) (Fitzwater, J.) ("*Barrow II*"). Thus as *Jett* and *Pembaur* make clear, even if the undisputed trial evidence established that GISD delegated final *decisionmaking* authority to Dr. Smith regarding whom to interview and recommend for promotion, this is insufficient of itself to attach liability to GISD under § 1983 for Dr. Smith's actions.[6] Accordingly, GISD cannot be held liable based on Dr. Smith's exercise of decisionmaking authority.

B

Barrow also contends that the court erred in refusing to grant her costs against Dr. Smith and in taxing GISD's costs against her. She argues that equity requires that she recover her costs because she won her case. Barrow's arguments concerning Dr. Smith will be considered later in this opinion, in conjunction with those in her preliminary

[6] Although Barrow also attempts to rely on the Supreme Court's decision in *Board of County Commissioners of Bryan County v. Brown,* 520 U.S. 397 (1997), her effort is misplaced. There the respondent contended that the Sheriff took the action that served as the basis for liability for the county. *Id.* at 401. The county stipulated that the Sheriff was the county's policymaker "regarding the Sheriff's Department." *Id.*

motion for attorney's fees. The court thus turns to the question whether GISD was entitled to recover its taxable costs from Barrow and holds that it was.

Citing *Byers v. Dallas Morning News, Inc.*, 209 F.3d 419, 430 (5th Cir. 2000), Barrow maintains that it is manifestly unjust to refuse to award costs to a prevailing civil rights plaintiff, and require her to pay them, when defendants are represented by the same insurance company and organized a joint defense, but ultimately lost. *Byers* does not support, or even speak to, her argument.

Barrow also argues that an award of costs to a prevailing defendant is the exception rather than the norm in a civil rights case. The cases she cites do not support her contention. Two of them – *Casa Marie Hogar Geriatrico, Inc. v. Rivera-Santos,* 38 F.3d 615 (1st Cir. 1994), and *Hughes v. Rowe,* 449 U.S. 5 (1980) – pertain to the shifting of attorney's fees, not costs. *See Casa Marie,* 38 F.3d at 618 ("In civil rights cases, *fee-shifting* in favor of a prevailing plaintiff is the rule, whereas *fee-shifting* in favor of a prevailing defendant is the exception." (emphasis added)); *Hughes,* 449 U.S. at 15 ("[A] plaintiff should not be assessed his opponent's *attorney's fees* unless a court finds that his claim was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so." (emphasis added) (quoting *Christiansburg Garment Co. v. EEOC,* 434 U.S. 412, 422 (1978))). The other case Barrow cites likewise fails to support her argument. Although the court in *Association of Mexican American Educators v. California,* 231 F.3d 572 (9th Cir. 2000), did affirm the district court's refusal to award costs to the defendant, the denial of costs appeared to depend heavily on the unique circumstances of the case rather than on a presumption against awarding costs to defendants in

civil rights cases. *See id.* at 593. In fact, the court explicitly stated that it did not "mean to suggest that the presumption in favor of awarding costs to prevailing parties does not apply to defendants in civil rights actions." *Id.*

The Fifth Circuit has recognized that "[p]ursuant to Fed. R. Civ. P. 54(d), except when provided otherwise by statute or rule, 'costs other than attorneys' fees shall be allowed as of course to the prevailing party unless the court otherwise directs.'" *Wilson v. City of Plano,* 160 F.3d 211, 212 (5th Cir. 1998) (per curiam). It has also stated that "Rule 54(d) creates 'a strong presumption that the prevailing party will be awarded costs[.']" *Id.* (quoting *Schwarz v. Folloder,* 767 F.2d 125, 131 (5th Cir. 1985)). Accordingly, the court holds that GISD – which prevailed against Barrow in this lawsuit – is entitled to recover its taxable court costs.

III

The court now turns to some of Dr. Smith's other arguments in his motions to alter or amend the judgment, for new trial, or for judgment as a matter of law.

A

Dr. Smith advances several arguments in support of his contention that he is entitled to qualified immunity. He asserts essentially the same arguments in his motion for new trial and posits that he should have been allowed to present evidence at trial in support of his qualified immunity defense.

The court "has discretion to grant a new trial under Rule 59(a) of the Federal Rules of Civil Procedure when it

is necessary to do so 'to prevent an injustice.'" *Gov't Fin. Servs. One Ltd. P'ship v. Peyton Place, Inc.*, 62 F.3d 767, 774 (5th Cir. 1995) (quoting *United States v. Flores*, 981 F.2d 231, 237 (5th Cir. 1993)). New trials can be granted under Rule 59 "for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States[.]" Rule 59(a). The rule "confirms the trial court's historic power to grant a new trial based on its appraisal of the fairness of the trial and the reliability of the jury's verdict." *Smith v. Transworld Drilling Co.*, 773 F.2d 610, 612-13 (5th Cir. 1985). "A new trial may be granted, for example, if the district court finds the verdict is against the weight of the evidence, the damages awarded are excessive, the trial was unfair, or prejudicial error was committed in its course." *Id.* at 613 (footnotes omitted).

Dr. Smith's contention in his motion to alter or amend judgment that the Fifth Circuit's decision in *Barrow* did not preclude him from asserting qualified immunity cannot withstand scrutiny. Assuming *arguendo* that the *Barrow* panel did not do so in any other context, it certainly settled the issue of Dr. Smith's non-entitlement to qualified immunity concerning the cause of action that the court submitted to the jury: Barrow's claim that Dr. Smith violated her right as a public school employee to educate her children in private school. The court need not therefore individually address the arguments in Dr. Smith's motions, because each is foreclosed under the law of the case.

In *Barrow* the Fifth Circuit reversed this court's decision that Dr. Smith was entitled to summary judgment on the basis of qualified immunity. *See Barrow*, 332 F.3d at 846. The panel held that "public-school employees like

Barrow have a protected right to educate their children in private school." *Id.* at 848. It concluded that "[t]he state cannot take an adverse employment action against a public-school employee for exercising this right unless it can prove that the employee's selection of private school materially and substantially affects the state's educational mission." *Id.* The panel held that "[b]ecause Smith failed to present a fact issue that Barrow's children's attendance of a private school would negatively impair district operations were Barrow selected for assistant principal, *the violation of a constitutional right is shown.*" *Id.* (emphasis added). This use of unequivocal language, considered in conjunction with the conspicuous absence of language similar to that used on other occasions by the Fifth Circuit to indicate that a party was not foreclosed from litigating an issue in future proceedings, foreclosed Dr. Smith from relying on the defense of qualified immunity at trial. *See, e.g., Harper v. Harris County, Tex.,* 21 F.3d 597, 599, 601 (5th Cir. 1994) (affirming trial court's denial of summary judgment based on qualified immunity and noting that "[o]f course, [the defendant] still may assert qualified immunity at trial. We express no view as to the facts that may be established at trial or as to the legal significance of those facts."); *Edwards v. Cass County, Tex.,* 919 F.2d 273, 277 (5th Cir. 1990) ("Out of an abundance of caution, however, we note that the defendants still may assert qualified immunity at trial. We express no view as to whether defendants in fact are entitled to such immunity." (citation omitted)); *McCuen v. Home Ins. Co.,* 633 F.2d 1150, 1152 (5th Cir. Unit B Jan. 1981) (per curiam) ("Because the case was decided on summary judgment on the basis of *Price v. Maryland Casualty Co.,* there was no determination made by the district court as to whether plaintiff was in fact discharged because of his age. . . . We

reverse the grant of summary judgment and remand to the district court for further consideration. We express no view as to the proper outcome of this case on remand."). The *Barrow* panel used no similar language. And, as noted, this court on remand submitted the case to the jury only on the basis of the right that the *Barrow* panel addressed. It did not permit Barrow to stray into, or instruct the jury on, claims for which Dr. Smith might arguably be entitled to qualified immunity.

For these reasons, the court denies Dr. Smith's motions to alter or amend the judgment or for a new trial on the basis that he is entitled to qualified immunity or should have been allowed to present evidence in support of this defense.[7]

B

Dr. Smith also argues that Barrow is not entitled to punitive damages or, alternatively, that the punitive damages award should be reduced. This argument also serves as the basis for his motion for judgment as a matter of law. He also advances arguments pertaining to punitive damages in his motion for new trial.

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[7] In his motion for judgment as a matter of law, Dr. Smith also argues that the award of punitive damages against him should be stricken or reduced because he was not allowed to present evidence and obtain a jury issue regarding qualified immunity or the extraordinary circumstances exception. These arguments fail for the reasons already discussed.

1

In his motion to alter or amend judgment, Dr. Smith argues that Barrow is not entitled to punitive damages because she did not properly plead them, and that such an award would violate his right to due process. He asserts essentially the same argument in his motion for judgment as a matter of law. It appears clear that, in this context, Dr. Smith is alleging a violation of his right to procedural due process.

In *Barrow v. Greenville Independent School District*, 2005 WL 39086 (N.D. Tex. Jan. 7, 2005) (Fitzwater, J.) ("*Barrow III*"), the court allowed Barrow to file a third amended complaint to seek punitive damages against Dr. Smith and granted him leave to depose her on this claim. *Id.* at *8. Dr. Smith's challenge is based on two arguments. First, he posits that Barrow's late amendment denied him the opportunity to prepare sufficiently for, and respond to, her claim for punitive damages. He contends that, until two months before trial, he was not on notice that Barrow would be allowed to claim punitive damages, and that he was not provided an adequate opportunity to conduct discovery and prepare for trial on this issue. Second, he argues that the late amendment was unduly prejudicial because he relied on Barrow's live pleadings in making his Rule 68 offers of judgment. These contentions lack force.

As *Barrow III* makes clear, Dr. Smith had sufficient notice well before the court allowed Barrow to seek punitive damages that he might be required to defend against a claim for such damages. Although the court recognized that Barrow's first amended complaint did not put Dr. Smith on notice that she was seeking punitive damages, it also pointed to the fact that Barrow had served both

defendants with an amended response to interrogatories on July 19, 2001, wherein she gave notice that she intended to seek punitive damages. *Id.* at *8. As the court explained, Dr. Smith received this notice approximately 40 days before discovery closed. *Id.* The court also observed that, on September 4, 2001, Barrow sought leave to amend her complaint, and her proposed complaint included a request for punitive damages. *Id.* Although the court denied her motion, it did so without prejudice. *Id.* Dr. Smith might not have known indubitably until *Barrow III* that Barrow would be allowed to seek punitive damages, but the court's reasoning shows that he knew as early as July or September 2001 – over three years before the court's decision in *Barrow III* – that a claim for punitive damages might enter the case. He could have conducted discovery that would have related to the propriety and amount of punitive damages after Barrow's July 2001 interrogatory responses reflected her intent to seek them, because discovery had not yet closed. And even if he should not have done so then, in *Barrow III* the court explicitly granted Dr. Smith the opportunity to depose Barrow on punitive damages. Although Dr. Smith appears to argue in his motion to alter or amend judgment that this was insufficient, he does not identify any information that he needed to prepare for trial that he was unable to acquire from Barrow's deposition or from evidence already available to him.[6] Additionally, he does not explain why

[6] Dr. Smith complains about obstructionist tactics undertaken by Barrow and her attorney during her deposition and includes excerpts from it. Even if Barrow and her attorney's conduct at the deposition was improper – a question the court does not reach – Dr. Smith still fails to explain specifically why this behavior prevented him from adequately preparing to defend Barrow's punitive damages claim.

the opportunity to depose Barrow was inadequate to prepare him to defend against her claim. Without this explanation, the court cannot conclude that Dr. Smith's right to procedural due process was violated. Finally, Dr. Smith did not move for a trial continuance in order to address the issue of punitive damages.

Dr. Smith's argument that he was prejudiced by the late addition of a punitive damages claim because he relied on Barrow's live pleadings in making his offer of judgments also fails to show that his right to due process was violated. If this rationale were accepted, the right under Rule 15(a) to amend one's pleadings could be subject to due process challenges in many cases in which Rule 68 offers of judgment have been made. This position is not supported by recognized procedural due process concepts.

Additionally, Dr. Smith himself raised the issue of the propriety of the punitive damages claim in his second motion for summary judgment, filed November 5, 2004. In considering the parties' arguments in relation to Dr. Smith's motion, the court permitted Barrow to file a third amended complaint to seek punitive damages. Dr. Smith had an adequate opportunity to present in his briefing his argument against her punitive damages claim.

Because Dr. Smith was given an adequate opportunity to be heard on this issue, his right to due process was not violated.

2

Dr. Smith also argues that a punitive damages award against him violates his substantive due process rights. He contends that he was not given fair notice that his alleged

actions would subject him to punitive damages. He maintains that it violates his rights to subject him to such damages for conduct that numerous school officials, the Texas Association of School Boards ("TASB"), school lawyers, judges, and even this court believed was legal.[9] He also complains that the parental rights claim at issue in this case had only been vaguely defined as to its content, had not been specifically defined as to its textual source in the Constitution, and had not been specifically defined as to the applicable level of scrutiny.

Although Dr. Smith posits a violation of his substantive due process rights, he appears to complain about inadequate notice. Thus his arguments are more accurately construed as pertaining to procedural due process. Like his arguments related to qualified immunity, these contentions are foreclosed by the law of the case. In *Barrow* the panel held that "no reasonable official could conclude that the application of the school district's public-school patronage policy to Barrow was constitutional."

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[9] Dr. Smith's assertion that this court considered his conduct *to be legal* is inaccurate. The court concluded that Dr. Smith was entitled to qualified immunity because "it was not clearly established in July 1998 that the school patronage requirement at issue violated [the] rights" that Barrow asserted, and because

> [a] reasonable Superintendent could have concluded that it was constitutional in July 1998 to condition a public school administrator's employment on sending her children to public school, once the Superintendent determined that not imposing such a restriction would materially and substantially impede the operation and effectiveness of the educational program.

Barrow I, 2002 WL 255484, at *5-*6. Rather than concluding that Dr. Smith's conduct was legal, the court held that Barrow had alleged a violation of her parental and free exercise rights. *See id.* at *3-*4.

Barrow, 332 F.3d at 849. Although Dr. Smith seems to argue that the Fifth Circuit's decision does not reflect reality and should not be considered in relation to punitive damages (even if it applies in the context of qualified immunity), the panel's decision is the law of the case, and this court is obligated to follow it. Any evidence that Dr. Smith would have offered at trial to prove that other officials, lawyers, or judges believed that a patronage policy such as the one at issue here was legal would conflict with the Fifth Circuit's unequivocal ruling to the contrary.

Moreover, although Dr. Smith appears to posit that his due process rights were somehow violated by the fact that the parental rights claim had not been defined either in its content or in its textual source, the Fifth Circuit's decision in *Barrow* holds that *Brantley* and *Fyfe* "confirm that the constitutional right of public-school employees to select a private-school education for their children was clearly established when Dr. Smith refused to consider Barrow for the position of assistant principal." *Barrow*, 332 F.3d at 848. Accordingly, contrary to Dr. Smith's contention and to this court's conclusion in *Barrow I*, the contours of the right that Barrow asserts in this case were clearly defined by *Brantley* and *Fyfe*. In reversing *Barrow I*, the Fifth Circuit implicitly recognized that Dr. Smith was on notice that his alleged conduct was unlawful. *See Kinney v. Weaver*, 367 F.3d 337, 367 (5th Cir. 2004) ("Qualified immunity should not be denied unless the law is such that reasonable officials should be 'on notice [that] their conduct is unlawful.'" (quoting *Saucier v. Katz*, 533 U.S. 194, 206 (2001)). Dr. Smith's due process rights were not violated on this basis.

Additionally, Dr. Smith's complaint that *Barrow* did not specifically define the appropriate level of scrutiny also fails to show a due process violation. Both *Brantley* and *Fyfe* place the burden on the state "to prove that a state action that interferes with protected educational choices of its public-school employees furthers the state's interest in the efficient operation of its schools." *Barrow,* 332 F.3d at 849. Because the Fifth Circuit concluded that *Brantley* and *Fyfe* confirmed that the right at issue was clearly established when Dr. Smith acted, it follows that these decisions sufficiently placed him on notice that it was his burden to adduce evidence that his adherence to a patronage policy advanced a state interest.

The court is therefore unable to conclude that Dr. Smith's right to due process was violated based on insufficient notice that his alleged actions would subject him to punitive damages.

3

Dr. Smith argues in his motions to alter or amend judgment and for judgment as a matter of law that Barrow is not entitled to punitive damages because the evidence does not support such an award. Although the way he phrases this argument appears to indicate that he is complaining that the trial evidence was insufficient to support such an award, he may in fact be asserting that the court erred by precluding him from introducing certain evidence to defend against punitive damages. This follows from the fact that his argument mirrors almost exactly the one in his motion for new trial, in which he maintains that he should have been permitted to present evidence related to the factors set out in *Kolstad v. American Dental Ass'n,*

527 U.S. 526 (1999), to counter Barrow's punitive damages claim.[10]

"[P]unitive damages may be awarded only when the defendant's conduct 'is motivated by evil intent or demonstrates reckless or callous indifference to a person's constitutional rights.'" *Williams v. Kaufman County,* 352 F.3d 994, 1015 (5th Cir. 2003) (quoting *Sockwell v. Phelps,* 20 F.3d 187, 192 (5th Cir. 1994)) (internal quotation marks omitted). The "reckless or callous indifference" this standard requires is " 'recklessness in its subjective form,' i.e. 'a subjective consciousness of a risk of injury or illegality and a criminal indifference to civil obligations.'" *Id.* (quoting *Kolstad,* 527 U.S. at 536) (internal quotation marks omitted).

Dr. Smith asserts that his conduct did not include "reckless or callous indifference to the federally protected rights of others," *Smith v. Wade,* 461 U.S. 30, 56 (1983), because (1) he did not know that the alleged actions would violate any of Barrow's federally-protected rights, (2) he believed his actions were legal, and (3) the underlying theory of discrimination is novel or otherwise poorly recognized. He argues that the evidence he proffered demonstrates that it was reasonable for him to be unaware that his alleged actions would violate Barrow's rights. He also contends that he could not have been recklessly or callously indifferent to Barrow's rights if he was not subjectively aware of the federal right at issue, and that this is particularly true when other reasonable

[10] Dr. Smith's argument that he was not allowed to present relevant evidence regarding punitive damages also serves as one of the bases for his motion for judgment as a matter of law.

public school officials were also subjectively unaware of that right.

In his motion for new trial, Dr. Smith complains that he was not permitted to introduce testimony and exhibits that underscore the reasonableness of his position, show that his conduct was not egregious, and establish that the law was poorly recognized. He appears to contend that he should have been permitted to introduce evidence that (1) TASB maintained a sample policy imposing a public school attendance requirement on administrators and that Dr. Smith was aware of this policy, (2) this court was unaware that the law was clearly established and held in *Barrow I* that his conduct was objectively reasonable, (3) numerous public school administrators and teachers stated that they believed a patronage policy would be legal or were uncertain as to its legal status, (4) many administrators and educators stated the existence of the TASB sample policy led them to believe that a patronage policy was legal, (5) although the alleged actions were illegal, that fact was not widely disseminated, and (6) it was reasonable for him and others to be unaware of the federal right at issue in light of the imposition of the competitive business model on the educational system in Texas in the last ten years. Dr. Smith maintains that, considering that Barrow directly attacked the reasonableness of his position, it substantially prejudiced his defense for the court to deprive him of the opportunity to present evidence to support the reasonableness of his position and that established the poor recognition that the law has received among professional educators. He contends that the presentation of this evidence would likely have resulted either in the complete elimination of the punitive damages award or in a drastic reduction of the award.

Dr. Smith's arguments are foreclosed by the Fifth Circuit's decision in *Barrow*. As already explained, the panel concluded that the right at issue in this case "was clearly established when Smith refused to consider Barrow for the position of assistant principal," and that "no reasonable official could conclude that the application of the school district's public-school patronage policy to Barrow was constitutional." *Barrow*, 332 F.3d at 848-49. These conclusions not only foreclose the contention that Dr. Smith acted reasonably in applying the patronage policy to Barrow, they also preclude the assertion that it was reasonable for Dr. Smith or any other official not to have known that applying the policy to Barrow would violate her rights. This court could not permit Dr. Smith to introduce evidence to prove either of these contentions given the fact that the law of the case stood in stark opposition. In the court's view, if no reasonable official could conclude that the application of a patronage policy to Barrow was constitutional, there was no principled basis to allow Dr. Smith to introduce evidence that would contradict the law of the case on this point.

Moreover, Barrow argued that if Dr. Smith was permitted to introduce this evidence, she should be allowed to introduce the *Barrow* panel opinion. To the extent Dr. Smith sought to introduce evidence to show that it was reasonable for him to be unaware that the application of a patronage requirement to Barrow would have violated her rights, Barrow likely would have been entitled to impeach such evidence by introducing the panel's conclusion that "no reasonable official could conclude that the application of the school district's . . . patronage policy to Barrow was unconstitutional." *Id.* at 849. Had the court allowed Dr. Smith's evidence and the *Barrow* opinion to be introduced,

the jury would have faced the confusing task of weighing the Fifth Circuit's binding legal conclusion on the matter against factual evidence that contradicted it. To prevent jury confusion and the possibility that the jury's decision on punitive damages could be influenced by a determination on the reasonableness of Dr. Smith's conduct that differed from the Fifth Circuit's conclusion that is the law of the case, the court prevented the introduction of Dr. Smith's evidence and of the panel opinion.

Although the court precluded Dr. Smith from introducing evidence that would have related to whether his belief was objectively reasonable, it did permit him to testify regarding his own knowledge of the law and beliefs at the time, recognizing that it was necessary that Barrow show subjective recklessness to prevail on her punitive damages claim. This afforded him a fair opportunity, consistent with the constraints imposed by the law of the case, to counter her claim for punitive damages by attempting to show that he was subjectively unaware that his decision violated the law.

Dr. Smith also argues that, although the Fifth Circuit concluded that the law was clearly established, the law has not been sufficiently disseminated. While this argument is unclear, he may be reasserting his argument that he did not recklessly or callously disregard Barrow's rights because the underlying theory of discrimination is novel or otherwise poorly recognized. The Supreme Court did indicate in *Kolstad* that "[t]here will be circumstances where intentional discrimination does not give rise to punitive damages liability" under a recklessness standard, and the Court appeared to identify as one such circumstance where "[t]he underlying theory of discrimination may be novel or otherwise poorly recognized[.]" *Kolstad*,

527 U.S. at 536-37. Dr. Smith cannot avail himself of this circumstance, however, in light of the Fifth Circuit's decision in *Barrow*. If no reasonable official could have concluded that the application of the patronage policy to Barrow was constitutional, then it cannot reasonably be said that the relevant law was novel or poorly recognized.[11] For these reasons, Dr. Smith's argument that he should have been permitted to present the evidence identified in his motions fails.

His contention that Barrow is not entitled to punitive damages because the evidence does not support such an award also lacks merit. Although Dr. Smith contends that he presented uncontroverted testimony that he did not know his alleged actions would violate Barrow's rights, he confirmed at trial what he testified to at his August 2000 deposition. He also acknowledged that, before his employment at GISD, he had a suspicion of the understanding that he should not be making employment decisions based on where someone educated her children. This is sufficient evidence to support a jury finding that he was subjectively conscious of a risk of illegality when he persisted in enforcing a patronage policy with respect to Barrow, and therefore supports the jury's assessment of punitive damages. Accordingly, Dr. Smith's arguments pertaining to the punitive damages award against him fail to show either that the award should be eliminated or reduced.

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[11] *Kolstad* is not a qualified immunity case, and the Court had no occasion to discuss how its conclusion regarding theories of discrimination that are novel or otherwise poorly recognized would relate to a threshold determination that the person accused of discrimination was not entitled to qualified immunity concerning the claim.

IV

The court now considers additional arguments that Dr. Smith raises in his motion for new trial.

A

Dr. Smith advances several arguments to support his more global contention that he should have been permitted to present evidence at trial related to the issue of material and substantial disruption. The court ruled in *Barrow v. Greenville Independent School District,* No. 3:00-CV-0913-D (N.D. Tex. Mar. 10, 2005) (Fitzwater, J.) ("*Barrow IV*"), that Dr. Smith could not "rely at trial on the defense that [Barrow's] exercise of her constitutional right to educate her children in private school materially and substantially impedes the operation or effectiveness of the state's educational program." Slip. op. at 1. It concluded that this was an affirmative defense that Dr. Smith was required to plead, and that allowing him to do so in his February 4, 2005 answer would unfairly surprise Barrow. *See id.* at 1, 2. Dr. Smith contends that the court's decision prejudiced him because a ruling of material and substantial disruption would mean that his alleged conduct did not violate Barrow's constitutional rights.

Dr. Smith's argument that the affirmative defenses he pleaded in his response to Barrow's first amended complaint were sufficient to raise this defense is foreclosed by *Barrow IV. See id.* at 2 ("The court disagrees with the assertion of Dr. Smith's counsel during the pretrial conference that this defense is fairly found within the affirmative defenses pleaded within earlier versions of his answer."). His argument that he had the right to plead the defense in response to Barrow's third amended complaint

is also foreclosed by the court's holding that allowing him to do so at this stage of the case would result in unfair surprise to Barrow. *See id.* at 1.

Moreover, the reasoning that Dr. Smith advances is inadequate to support his argument. He appears to complain that, even though the court gave Barrow permission to file a third amended complaint to seek punitive and mental anguish damages, she actually did more than that and more than doubled the size of her complaint in comparison to her first amended complaint. The mere increase in the size of Barrow's complaint, without an explanation of why the amendments warranted the assertion of an affirmative defense, does not show that he was entitled to plead the defense in response. Additionally, although Dr. Smith also points out that Barrow's third amended complaint alleges a wide array of claims against him, including claims under Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e *et seq.*, and Chapter 110 of the Texas Civil Practice and Remedies Code ("Chapter 110"), he fails to explain why alleging claims under these statutes gave him the right to assert an affirmative defense to a constitutional claim, and the court holds that it did not.

Finally, Dr. Smith argues that the addition of punitive damages justified pleading the defense because the issue of material and substantial disruption is related to whether his conduct was egregious, reckless, and/or callous. This argument cannot serve as the basis for a new trial.

First, to the extent Dr. Smith is complaining that he should have been able to introduce evidence of material and substantial disruption in defense of Barrow's punitive

damages claim, he was not required to plead the defense in order to introduce such evidence. Although the court precluded Dr. Smith from introducing evidence of material and substantial disruption in defense of Barrow's underlying constitutional claim because he had not adequately pleaded an affirmative defense, the assertion of material and substantial disruption was not an affirmative defense to her claim for punitive damages. In *Barrow IV* the court held that the defense was an affirmative one that Dr. Smith was required to plead as to Barrow's constitutional claim because "the contention that the exercise of Barrow's constitutional right to educate her children in private school materially and substantially impedes the operation or effectiveness of the state's educational program concerns a matter outside her prima facie case." *Id.* To recover punitive damages, Barrow was obligated to show that Dr. Smith's conduct was either "motivated by evil motive or intent" or involved "reckless or callous indifference" to her rights. *Smith,* 461 U.S. at 56. Accordingly, to the extent evidence regarding material and substantial impairment was probative of whether Dr. Smith's conduct was reckless or callous, it concerned a matter that Barrow was required to prove to make out a claim for punitive damages and did not relate to an affirmative defense. As a result, Dr. Smith did not need to plead the defense to introduce evidence pertaining to this issue to the extent it related to punitive damages.

To the extent Dr. Smith attempted at trial to introduce evidence of material and substantial disruption for a purpose other than the one that was foreclosed under the court's pretrial ruling, he did not clearly alert the court to the fact that he was attempting to do so. In *Barrow IV* the court stated that it was "not precluding a defendant from

introducing evidence of [material and substantial impairment] if relevant for another purpose, *such as addressing whether Dr. Smith should be held liable for punitive damages.*" *Barrow IV,* No. 3:00-CV-0913-D, slip op. at 3 (emphasis added). Had Dr. Smith made clear that he was relying on *Barrow IV* and offering the evidence for the purpose of defending against Barrow's punitive damages claim and not simply to preserve error concerning the pretrial ruling, the court would have considered the evidence in that context and, after considering any objections, might have admitted it. Because Dr. Smith did not clearly seek to introduce evidence of material and substantial disruption on the question of punitive damages, the court had no occasion to decide whether it was admissible for that purpose. As the court stated in *Barrow IV,* it would "decide whether the specific evidence offered is relevant and admissible, *if and when offered.*" *Id.* (emphasis added).

Second, the addition of Barrow's claim for punitive damages did not entitle Dr. Smith to plead the affirmative defense of material and substantial disruption as to Barrow's constitutional claim. Nothing about the addition of Barrow's punitive damages claim vitiated the reasons the court held in *Barrow IV* that Dr. Smith was precluded from relying on the defense at trial. Barrow would still have been unfairly surprised if Dr. Smith had been allowed to plead the defense in response to her third amended complaint.

For these reasons, Dr. Smith has failed to show that a new trial is warranted.[12]

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[12] In his motion for judgment as a matter of law, Dr. Smith also argues that the punitive damages award should be stricken or reduced

(Continued on following page)

B

Dr. Smith also argues that he was denied procedural due process at trial. He posits that Barrow's assertion of frivolous claims against GISD caused him hardship and a denial of due process.

First, he complains that the court required him to share the allotted 18 ½ hours of trial time with GISD and, as a result, he did not have sufficient time to present his case. This argument fails for two reasons. The most obvious one is that Dr. Smith and GISD completed their part of the trial *with time remaining*. Dr. Smith cannot reasonably contend that he did not have adequate time to present his case when he did not even use all of the time allotted. His argument fails for the additional reason that he did not object at trial either to having to share trial time with GISD or to the amount of time allocated. And – probably because he did not use all the time he was given – he did not request more time.

Second, Dr. Smith argues that having to share time with GISD forced the defendants into an unnatural alliance, in which Dr. Smith was pressured not to call certain witnesses for fear that GISD would take up Dr. Smith's allotted time trying to attack his witnesses' credibility. This argument fails because Dr. Smith never objected to

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because he was not allowed to present evidence and obtain a jury issue related to the issue of material and substantial impairment. For the reasons given, this argument fails.

having to share time with GISD, either before the trial started or after it began.[13]

Third, Dr. Smith complains that Barrow would not have been able to enter a letter by Cobby Caputo, Esquire ("Caputo") that was introduced at trial but for the fact GISD was a defendant, since Caputo and the law firm Schwartz & Eichelbaum were GISD's lawyers, not his. He argues that the introduction of Caputo's correspondence improperly and negatively affected his defense. Dr. Smith neither made this objection at trial nor moved for other relief, such as a separate trial. Accordingly, the court concludes that a new trial is not warranted on this basis.

C

Dr. Smith contends that he should have been permitted at trial to present evidence in support of a *Mt. Healthy*[14] defense.

"Under [*Mt. Healthy*] even if the government has considered an impermissible criterion in making a decision adverse to the plaintiff, it can nonetheless defeat liability by demonstrating that it would have made the same decision absent the forbidden consideration." *Texas v. Lesage*, 528 U.S. 18, 20-21 (1999) (per curiam). Dr. Smith argues that, based on Barrow's deposition, she would not have received the position of Assistant Principal in 1998, even if she had applied and been interviewed. He explains

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[13] Dr. Smith did object to sharing peremptory strikes with GISD, which the court remedied by pretrial ruling. He did not object to sharing trial time.

[14] *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977).

that, during his tenure as GISD Superintendent, he instituted a procedure for selecting administrators based on preset interview questions. The interviewer would listen for certain words and phrases in an applicant's responses and award points based on how many of the specified words and phrases the applicant used. Dr. Smith acknowledges that Barrow was not interviewed and, as a result, does not have a score for 1998. Nevertheless, Barrow was asked the preset questions in her deposition in 2001, and Dr. Smith and William Smith, GISD's current Superintendent, scored her answers. The gist of Dr. Smith's arguments is that Barrow would not have qualified for the position of Assistant Principal in 1998 based on the score she received. Dr. Smith argues that it is unreasonable to think that Barrow became less capable over the three years spanning 1998 and 2001, considering that she had the questions and the correct answers before her deposition.[15] Thus he argues that even if Barrow had applied in 1998 for the position of Assistant Principal and been interviewed, she would not have been selected. He contends the exclusion of evidence pertaining to his *Mt. Healthy* defense prejudiced him, because the evidence directly contests Barrow's claim that she would have been selected for the position of Assistant Principal if she had been interviewed.

The court did not abuse its discretion in preventing Dr. Smith from introducing at trial Barrow's responses to the questions posed in her 2001 deposition. The court excluded the evidence based on its questionable relevance. That Barrow responded one way in her deposition in 2001

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[15] Dr. Smith maintains that the preset questions and scoring card were released to Barrow during discovery.

is not probative of whether she would have responded the same way in an interview in 1998.[16] Indeed, it is not difficult to imagine several factors that could have affected her performance during the deposition. A potentially significant one is the context in which Barrow ultimately answered the preset interview questions. Barrow's performance could have been detrimentally impacted by having to respond to the questions during the stress of a deposition rather than during an employment interview. Although employment interviews can be stressful, common sense teaches that there is often a significant difference between how one answers questions posed by a lawyer and those asked by a panel during an interview. Her answers could have been affected by the materially different purposes for which the questions were being asked. And, significantly, during a deposition, when a person is testifying under oath, she can be expected to choose her words carefully – to tell the whole truth and nothing but the truth – rather than to use the specific words and phrases that might increase the number of points she is awarded.

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[16] The court addressed this issue in a related context when it decided Dr. Smith's summary judgment motion in *Barrow III*, and its reasoning supports the court's decision at trial.

> The interview questions were asked of Barrow three years after the employment decision was made, and she was questioned by opposing counsel in the context of a deposition rather than by school administrators in a job interview. To conclude that the scores from Barrow's deposition testimony establish beyond peradventure that Barrow would not have been a finalist, the court would have to infer that her answers during the 2001 deposition would have been the same in a 1998 job interview, and that her answers were scored as they would have been in 1998.

Barrow III, 2005 WL 39086, at *5.

D

Dr. Smith also contends that the court erred in refusing to include instructions in the court's charge that advised the jury of the circumstances under which a patronage policy could be legal. He argues that, even if he could not attempt to avoid liability on the basis of a material and substantial disruption, the error prejudiced him regarding punitive damages, because the jury instructions created the impression that a patronage policy would always violate Barrow's rights. Although it is true that the enforcement of a patronage policy can be legal if the school district or school official shows that the school's educational mission will be materially and substantially impaired, as the court has already explained, it decided in *Barrow IV* that Dr. Smith was procedurally barred from presenting the defense of material and substantial impairment at trial. Because there was no such evidence adduced at trial, the court did not err in refusing to instruct the jury concerning the defense of material and substantial impairment. *See, e.g., Jackson v. Taylor,* 912 F.2d 795, 798 (5th Cir. 1990) ("[I]t is error to refuse a jury instruction only if there are pleadings and sufficient evidence to support the instruction.").

V

The court now addresses Barrow's arguments in her preliminary motion for attorney's fees and in her motion to alter or amend judgment and motion for judgment as a matter of law that pertain to her entitlement to attorney's fees and/or costs.

In a memorandum opinion and order that the court filed in conjunction with the judgment in this case, it

noted that the judgment provided that Barrow would bear her own taxable costs of court, subject to amending the judgment in response to a timely-filed post-judgment motion. *See Barrow v. Greenville Indep. Sch. Dist.*, No. 3:00-CV-0913, slip. op. at 1-2 (N.D. Tex. Mar. 25, 2005) (Fitzwater, J.) ("*Barrow V*"). The court explained that, although Barrow had prevailed against Dr. Smith and would normally recover her taxable costs of court as a matter of course, Dr. Smith had made Rule 68 offers of judgment that might result in denying Barrow some of these costs. *Id.* After the court accepted the verdict, and after considering counsels' positions concerning the most efficient manner in which to proceed, it directed Barrow to file only a summary motion for attorney's fees, excluding the amount of fees sought or supporting documentation, until the court had the opportunity to review Dr. Smith's offers of judgment. Timely post-trial motions have been filed, and the court now addresses the arguments that pertain to the award to Barrow of attorney's fees and court costs.

A

Barrow argues in her motion to alter or amend judgment and motion for judgment as a matter of law that the court erred in refusing to grant her costs against Dr. Smith. She contends that a presumption exists that a prevailing party is entitled to recover her costs, and that no law supports the position that a prevailing civil rights plaintiff can be denied her costs because a defendant allegedly made a Rule 68 offer of judgment. Although under Rule 54 a prevailing party is presumptively entitled to recover her costs, *see Wilson*, 160 F.3d at 212, "Rule 68 . . . removes the presumption in favor of the prevailing

party, and provides for the assessment of costs against a prevailing plaintiff who obtains a judgment less favorable than the offer of judgment made by defendant." *Pub. Interest Research Group, Inc. v. Struthers-Dunn, Inc.*, 1988 WL 147639, at *2 (D.N.J. Aug. 16, 1988). Rule 68 explicitly provides that, "[i]f the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer." Rule 68. Therefore, the question whether Barrow is entitled to costs will depend on whether Dr. Smith made valid offers of judgment under Rule 68 and whether the judgment Barrow finally obtained is more favorable than Dr. Smith's offers. It must be kept in mind that "the term 'costs' in Rule 68 was intended to refer to all costs properly awardable under the relevant substantive statute or other authority." *Marek v. Chesny*, 473 U.S. 1, 9 (1985). Because Barrow pursued her constitutional claims under § 1983, as a prevailing plaintiff, Barrow would be entitled to recover reasonable attorney's fees as part of her costs pursuant to 42 U.S.C. § 1988. *See id.*; 42 U.S.C. § 1988. Thus in the instant case, the "costs" mentioned in Rule 68 encompass not only Barrow's taxable court costs, but also her reasonably-incurred attorney's fees. *See Marek*, 473 U.S. at 9.

In her preliminary motion for attorney's fees, Barrow argues that Dr. Smith's offers of judgment[17] have no

[17] Dr. Smith was involved in three different offers of judgment. The first was made jointly by Dr. Smith and GISD on August 23, 2000 for $30,000. This amount specifically encompassed "any and all items of damage, other than attorney's fees, which are to be awarded separately by the Court." Ds. Aug. 23, 2000 Offer of Judgment at 1. The second was made solely by Dr. Smith on January 18, 2001 for $100,000, which encompassed "any and all items of damage and recovery sought by Plaintiff, including attorney's fees." Dr. Smith Jan. 18, 2001 Offer of Judgment at 1. The third was again made jointly with GISD on

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impact on her entitlement to attorney's fees and related litigation costs.[18] She advances virtually the same arguments in her briefs in support of her motion to alter or amend judgment and motion for judgment as a matter of law in support of the contention that the court erred in refusing to grant her costs against Dr. Smith. Some of Barrow's arguments challenge the validity of the offers of judgment Dr. Smith made, while others appear to be directed to showing that the judgment she ultimately received is more favorable than Dr. Smith's offers. The court will address her arguments in turn.

B

The court addresses first Barrow's challenges to the validity of Dr. Smith's offers of judgment.

1

Barrow appears to argue that Dr. Smith's failure to admit liability and agree to equitable relief invalidates his

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September 8, 2004 for $154,666.00, which encompassed "any and all items of damage and recovery sought by Plaintiff, including attorney's fees." Ds. Sept. 8, 2004 Offer of Judgment at 1.

Although she specifically addresses most of her arguments in her preliminary motion for attorney's fees to defendants' August 2000 offer of judgment, she also posits at one point that Dr. Smith's January 2001 offer suffers from the same defects. Unless the context indicates otherwise, the court will address Barrow's arguments as if they were specifically directed to both the August 2000 and January 2001 offers of judgment.

[18] Although Barrow advances several arguments in support of her contention that Dr. Smith's offers of judgment have no impact on her entitlement to attorney's fees and costs, she does not cite any supporting authority.

offers. She avers that he did not offer to resolve the unlawful employment condition that he imposed, a promotion, injunctive prohibition on his future unlawful edicts, or a GISD policy prohibiting use of a patronage policy when making employment decisions. Barrow also complains that the offers lacked an admission of liability and an agreement to enter a declaratory judgment declaring use of the patronage policy that violated the law.

Barrow's argument that Dr. Smith's offers are invalid because he did not admit liability lacks merit. The court agrees with other courts that hold that "Rule 68 does not require that offers of judgment include[] admissions of liability." *Jolly v. Coughlin,* 1999 WL 20895, at *8 (S.D.N.Y. Jan. 19, 1999); *see also Staples v. Wickesberg,* 122 F.R.D. 541, 544 (E.D. Wis. 1988) (considering the same argument raised here and rejecting it as being "utterly without merit"); *Mite v. Falstaff Brewing Corp.,* 106 F.R.D. 434, 435 (N.D. Ill. 1985) (denying plaintiff's objections to Rule 68 offer of judgment that explicitly disclaimed admission of liability, finding that offer was technically sufficient). As one court has observed, disclaiming liability in Rule 68 offers of judgment appears to be commonplace. *Aynes v. Space Guard Prods., Inc.,* 201 F.R.D. 445, 450 (S.D. Ind. 2001) (citing cases); *see, e.g., Delta Air Lines, Inc. v. August,* 450 U.S. 346, 349 n.2 (1981) (noting offer of judgment that contained disclaimer of liability); *MRO Communs., Inc. v. AT&T Co.,* 197 F.3d 1276, 1279 (9th Cir. 1999) (same); *Chathas v. Local 134 Int'l Bhd. of Elec. Workers,* 233 F.3d 508, 511 (7th Cir. 2000) (noting that "[t]he essence of the offer was that the preliminary injunction would be made permanent, but that the offer was not to be construed as an admission of liability."); *Colondres v. Scoppetta,* 290 F. Supp. 2d 376, 384 (E.D.N.Y. 2003)

(noting that "[d]efendants' Rule 68 offer specifically stated that it was not to be construed as an admission of liability."). Rule 68 itself does not explicitly prevent this practice. Moreover, "[t]he policy behind Rule 68 is to 'encourage settlement and avoid litigation.'" *Jason D.W. by Douglas v. Houston Indep. Sch. Dist.*, 158 F.3d 205, 212 (5th Cir. 1998) (quoting *Marek*, 473 U.S. at 5). "[R]equiring a clear admission of liability in every offer of judgment would . . . reduce the effectiveness of Rule 68 as a tool to encourage the settlement of all lawsuits." *Jolly*, 1999 WL 20895, at *8. Accordingly, Dr. Smith's offers of judgment are not rendered invalid because they do not contain an admission of liability.

Nor are Dr. Smith's offers invalid because they failed to provide for the equitable or declaratory relief Barrow listed or to manifest his assent to issuance of a declaratory judgment. Barrow's first amended complaint, which was her operative complaint at the time Dr. Smith made his contested offers of judgment, did pray for monetary damages as well as injunctive and declaratory relief. Nevertheless, Dr. Smith was not obligated to offer each type of relief in his Rule 68 offers. Rule 68 appears to allow a party who makes an offer to specify what he is willing to give up in exchange for allowing a judgment to be entered against him. *See* Rule 68 ("[A] party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against the defending party for the money or property *or to the effect specified in the offer*[.]" (emphasis added)). The court in *Leach v. Northern Telecom, Inc.*, 141 F.R.D. 420 (E.D.N.C. 1991), rejected an argument similar to Barrow's in deciding the plaintiff's motion to strike the defendant's offer of judgment. *Id.* at 428. The plaintiff argued that the offer was insufficient

because it did not include the equitable relief she sought in her complaint. *Id.* The court held that "[n]othing in Rule 68 requires equitable relief to be included as part [of] an offer of judgment when the complaint seeks both equitable and monetary relief." *Id.*; *see also* 13 *Moore's Federal Practice* § 68.04[5], at 68-28 (3d ed. 2005) (quoting *Leach* and observing that "[a]n offer responding to a complaint seeking both damages and injunctive relief need not specify some element of both."); *but see Whitcher v. Town of Matthews,* 136 F.R.D. 582, 585 (W.D.N.C. 1991) (concluding that "offers including only monetary damages but excluding equitable or injunctive relief would . . . be inconsistent with [Rule 68]" and observing that "had [d]efendant made Offers of Judgment excluding the portion of the complaint addressing injunctive relief, the offer would have been ineffective[.]"). *Leach*'s holding is sound. As one recognized treatise explains, "[i]f a defendant may offer less than all the compensatory damages sought . . . there is no reason why it may not offer only one form of relief when a complaint seeks both injunctive and damage remedies." 13 *Moore's Federal Practice* § 68.04[5], at 68-28 (3d ed. 2005).

2

Barrow also argues that Dr. Smith's offers of judgment imposed conditions that Rule 68 does not permit. Specifically, she maintains that the offers were conditioned on her willingness to enter into a settlement and release of all claims made the basis of her suit. *See* Ds. Aug. 23, 2000 Offer of Judgment at 1 ("This offer of judgment is made in exchange for a settlement and release of all claims by [Barrow] against Defendants . . . arising from Plaintiff's alleged injuries made the basis of this litigation."); Dr.

Smith Jan. 18, 2001 Offer of Judgment at 1 (providing similarly). She argues that Rule 68 is not an alternative method for making settlement offers, but provides for "an offer to allow judgment to be taken against the defending party[.]" Rule 68. Barrow contends that Dr. Smith's offers are settlement offers, not Rule 68 offers to allow a judgment to be taken against the defending party, because he never said that he would allow a judgment to be taken against him.

Barrow's argument implies that a Rule 68 offer cannot also be a settlement offer. This implication is incorrect. Even though an offer made under Rule 68 is termed an "offer of judgment," this does not negate the fact that an offer made under this Rule is a settlement offer in that it proposes terms upon which the controversy between the parties will be resolved. Several courts, including the Supreme Court, have suggested that offers made under Rule 68 are, in fact, settlement offers. *See, e.g., Delta Air Lines,* 450 U.S. at 350 ("Rule 68 prescribes certain consequences for *formal settlement offers* made by 'a party defending against a claim.'" (emphasis added)); *id.* at 363 (Powell, J., concurring) ("A Rule 68 offer of judgment is a *proposal of settlement. . . .*" (emphasis added)); *First Nat'l Bank v. FDIC,* 196 F.3d 1186, 1189 (10th Cir. 1999) ("'Rule 68 permits a party defending against a claim to recover all costs incurred after the making of an offer of judgment if the offeree rejected the *settlement offer* and ultimately was awarded less at trial.'" (quoting *Am. Ins. Co. v. El Paso Pipe & Supply Co.,* 978 F.2d 1185, 1193 (10th Cir. 1992) (emphasis added)); *Ortiz v. Regan,* 980 F.2d 138, 141 (2d Cir. 1992) ("Rule 68 permits a party defending against a claim to make a *settlement offer* and thereby avoid any liability for costs, including attorney's fees, incurred after

the making of the offer." (emphasis added)); *Guerrero v. Cummings,* 70 F.3d 1111, 1113 (9th Cir. 1995) (referring to offer made under Rule 68 as "Rule 68 settlement offer"); *Bynum v. Equitable Mortgage Group,* 2005 WL 818619, at *5 (D.D.C. Apr. 7, 2005) ("[A]n accepted Rule 68 offer of judgment constitutes a settlement between the parties making and accepting the offer.").

The terminology Dr. Smith used in his offers, in which he conditioned them on the release of Barrow's claims, is not prohibited by Rule 68. Including such language simply makes explicit what the operation of the Rule already provides on its own. "Under Rule 68 . . . a party may compromise a claim by offering a settlement to be entered against it in a form of a final judgment. By operation of the rule, if the offer is accepted, all claims are settled and the case is concluded." *Williams v. J.C. Penney Co.,* 1991 WL 150617, at *1 (S.D.N.Y. Jul. 30, 1991). If Barrow had accepted one of Dr. Smith's offers of judgment, with or without the contested language, her claims against him would have been settled via the resulting judgment.

Finally, that Dr. Smith did not explicitly state that he was allowing a judgment to be taken against him does not render his offers ineffective under Rule 68. The language of Dr. Smith's offers clearly indicates that he was making them under Rule 68. *See* Ds. Aug. 23, 2000 Offer of Judgment at 1 ("Defendants . . . present their Offer of Judgment pursuant to Rule 68[.]"); Dr. Smith Jan. 18, 2001 Offer of Judgment at 1 ("Defendant offers Judgment in the amount of $100,000.00 . . . as provided for by Rule 68."). Accordingly, it was sufficiently clear from the offers that Dr. Smith made that he was offering to allow a judgment to be entered against him according to the operation of the Rule. For the foregoing reasons, Barrow has failed to show

that Dr. Smith's offers of judgment are not valid under Rule 68.

C

The court now considers whether the judgment Barrow finally obtained is more favorable than Dr. Smith's offers of judgment. Barrow appears to rely on both monetary and non-monetary factors in attempting to show that the judgment she obtained is more favorable than the offers. The court addresses monetary factors here and non-monetary factors below.

1

The court first considers whether the judgment Barrow obtained is more favorable than defendants' August 2000 offer of judgment for $30,000.

Barrow points out that the court awarded her judgment for $15,455.00 plus prejudgment interest, which she calculates to be $2,967.44. The judgment also awarded her $20,000 in punitive damages. Adding these sums together, Barrow obtained a judgment in the amount of $38,422.44. In an argument apparently directed specifically to defendants' August 2000 offer, Barrow maintains that this amount is more favorable, by at least 28%, than the offer defendants made.

Defendants' offer provides that "[d]efendants offer Judgment in the amount of $30,000.00. . . . This lump-sum amount encompasses any and all items of damage, other than attorney's fees, which are to be awarded separately by the Court." Ds. Aug. 23, 2000 Offer of Judgment at 1. In *Marek* the Supreme Court explained that Rule 68 does not

require defendants to "itemize the respective amounts being tendered for settlement of the underlying substantive claim and for costs." *Marek*, 473 U.S. at 6. It did state, however, that the offer must "be one that allows judgment to be taken against the defendant for both the damages caused by the challenged conduct and the costs then accrued." *Id.* (emphasis omitted). Because "costs" in the instant case include not only taxable costs but also attorney's fees, defendants' offer must have allowed judgment to be taken as to both. Since defendants' offer explicitly provided for the assessment of attorney's fees, Barrow's apparent intimation that defendants did not agree to pay attorney's fees in their offer is incorrect. Defendant's offer, however, does not mention court costs. This fact does not render defendants' offer invalid. The Supreme Court explained in *Marek* that

> it is immaterial whether the offer recites that costs are included, whether it specifies the amount the defendant is allowing for costs, or, for that matter, whether it refers to costs at all. As long as the offer does not implicitly or explicitly provide that the judgment *not* include costs, a timely offer will be valid.

Id. Defendants' offer neither explicitly nor implicitly precludes a judgment for costs.

A separate, yet relevant, inquiry is whether court costs are included in the $30,000 sum that defendants offered. The offer explicitly excludes attorney's fees from this amount but is silent as to court costs. If the court concludes that the sum of $30,000 does not include court costs, the court will award them separately. *See id.* ("[I]f the offer does not state that costs are included and an amount for costs is not specified, the court will be obliged

by the terms of the Rule to include in its judgment an additional amount which in its discretion it determines to be sufficient to cover the costs." (citation omitted)). It is evident from Barrow's briefing that she is unsure whether defendants' offer includes court costs. In her reply brief supporting her motion to alter or amend judgment and motion for judgment as a matter of law, she avers at one point that defendants' offer is unclear as to court costs. At another point in the same brief she posits that it did not include court costs. In her preliminary motion for attorney's fees, however, Barrow contends that defendants' offer did include her court costs. The court need not clear up this confusion because, as it will explain, the judgment that Barrow ultimately obtained is more favorable than defendants' offer, regardless whether the $30,000 offer includes court costs.

In her motion to alter or amend judgment and motion for judgment as a matter of law, Barrow argues that, in order to determine if she obtained a judgment more favorable than defendants' offer, her costs must be determined because they are part of the judgment.[19] Her preliminary motion for attorney's fees suggests that her argument is premised on the inclusion of court costs in defendants' $30,000 offer. There Barrow argues that

[19] The court does not construe this argument as advancing the position that court costs incurred after the offer of judgment was made should be considered in addition to pre-offer costs in determining the value of the judgment finally obtained. In any case, such an argument is foreclosed by the Supreme Court's decision in *Marek*. In *Marek* the Court recognized that post-offer costs should not be considered in determining whether the judgment finally obtained is more favorable than an offer of judgment. *See Marek*, 473 U.S. at 7; *see also Marryshow v. Flynn*, 986 F.2d 689, 692 (4th Cir. 1993).

"because the amount offered by [defendants'] included cost[s] of court in the 'lump-sum', the comparison required by Rule 68 requires that the district court include in the judgment obtained . . . Plaintiff's costs of court." P. Prelim. Mot. for Atty's Fees at 8.

The court has located no Fifth Circuit case that has specifically addressed whether pre-offer attorney's fees and/or costs should be considered as part of the "judgment finally obtained" for conducting the comparison called for by Rule 68. Other circuits that have considered the issue appear to conclude, however, that, if the offer of judgment includes costs and attorney's fees, the fees and costs accrued at the time of the offer should be added to the amount of the judgment for purposes of the Rule 68 comparison. *See, e.g., Champion Produce, Inc. v. Ruby Robinson Co.,* 342 F.3d 1016, 1020 (9th Cir. 2003) ("Where a Rule 68 offer explicitly states that it is inclusive of prejudgment interest and pre-offer costs and attorneys' fees, the judgment to which the offer is compared must include these items if they are awarded."); *Tunison v. Continental Airlines Corp.,* 162 F.3d 1187, 1192 (D.C. Cir. 1998) ("[S]ince the offer includes pre-offer costs, the amount of judgment used for comparison must include pre-offer costs as well, if they are to be awarded."); *Scheeler v. Crane Co.,* 21 F.3d 791, 792-93 (8th Cir. 1994) (noting that offer of judgment was "for a full settlement of plaintiff's claims, including costs and attorney fees accrued" and finding that "[i]f the plaintiff's payment of her own attorney fees was part of the Rule 68 offer, it is surely equitable that attorney fees be included as part of the recovery. This is the only way in which the offer can be fairly matched against the recovery."); *Marryshow v. Flynn,* 986 F.2d 689, 692 (4th Cir. 1993) ("Because the

offer includes costs then accrued, to determine whether the judgment obtained is 'more favorable,' . . . the judgment must be defined on the same basis – verdict plus costs incurred as of the time of the offer of judgment."); *see also Grosvenor v. Brienen,* 801 F.2d 944, 945, 948 (7th Cir. 1986) (holding that "pre-offer attorney's fees must be added to the judgment award for the purposes of determining whether the result obtained by a plaintiff is more favorable than the offer of judgment he rejected" in case where court observed that defendant's $5,000 offer of judgment "included costs and attorney's fees accrued up to the date of the offer."). In considering pre-offer costs or attorney's fees as part of the judgment finally obtained, the courts in *Marryshow* and *Scheeler* were clearly motivated by an interest in achieving an accurate and equitable comparison of the offers of judgment to the judgment the plaintiff ultimately received. *Marryshow* explained that

> [i]t is neither logical nor consistent with the rule and applicable authority to compare an offer of judgment which includes all costs, including attorney's fees, and a judgment finally obtained which includes no costs. To make a proper comparison between the offer of judgment and the judgment obtained when determining, for Rule 68 purposes, which is the more favorable, like "judgments" must be evaluated.

Marryshow, 986 F.2d at 692; *see also Scheeler,* 21 F.3d at 793.

Assuming *arguendo* that defendants' $30,000 offer did not include court costs, the total value of the offer would actually be $30,000 plus Barrow's pre-offer attorney's fees and costs, because the court would award these items

separately. In accord with the cases cited above, in conducting the analysis called for by Rule 68, the court must compare this amount with the value of the judgment Barrow obtained – $38,422.44 – plus her pre-offer attorney's fees and costs. *See Tunison,* 162 F.3d at 1192 (holding that where plaintiff obtained damage award of $0 and defendant's offer of judgment for $1,000 did not include costs, even if plaintiff was entitled to costs, "the appropriate comparison under Rule 68 would [be] between $1,000 plus pre-offer costs and $0 plus pre-offer costs."). This ensures that like "judgments" are compared, as the court in *Marryshow* counseled. Because Barrow's pre-offer attorney's fees and costs will represent the same figure on both sides of the Rule 68 equation, the court may disregard them for purposes of the comparison. This explains why pre-offer attorney's fees and costs need only be considered when the offer made actually includes these items. Because the judgment Barrow obtained worth $38,422.44 is more favorable than defendant's offer of $30,000, her ability to recover her post-offer costs and attorney's fees is not affected by defendants' offer.

On the other hand, if defendants' $30,000 offer *did* include court costs, to determine whether the judgment she obtained is more favorable than defendants' offer, the court must ascertain the amount of recoverable court costs Barrow had incurred by the time of defendants' offer and add that amount to the $38,422.44 judgment. The court need not consider her pre-offer attorney's fees because, as explained above, they would be considered on both sides of the Rule 68 equation. Accordingly, the "judgment finally obtained" by Barrow under this scenario would be $38,422.44 plus her pre-offer court costs. This is certainly more favorable than $30,000. Thus even if defendants'

$30,000 offer included court costs, the judgment Barrow obtained is more favorable and defendants' offer would not affect her recovery of post-offer costs and attorney's fees.

2

The court next considers whether Dr. Smith's individual offer of $100,000 in January 2001 is more favorable than the judgment Barrow obtained. The court again restricts its analysis to monetary considerations.

Dr. Smith's offer is patently more favorable than the relief awarded in the judgment. Nevertheless, Barrow maintains that Dr. Smith's offer did not come close to compensating her for her monetary damages, costs of court, and accrued attorney's fees incurred to the date of the offer, much less the equitable relief sought. Construing Barrow's argument somewhat generously, she may be suggesting that, for purposes of determining whether Dr. Smith's offer is less favorable than the judgment she obtained, the court must consider as part of the judgment both her attorney's fees and the court costs she incurred before his offer.

The court must first address whether Dr. Smith's $100,000 offer included court costs and attorney's fees. The offer provides, in relevant part, that "[t]his lump-sum amount encompasses any and all items of damage and recovery sought by Plaintiff, including attorney's fees." Dr. Smith Jan. 18, 2001 Offer of Judgment at 1. It is clear from this language that the sum of $100,000 includes attorney's fees. But as was the case with defendants' August 2000 offer, Dr. Smith's offer does not explicitly provide whether it includes court costs. As distinguished from defendants' $30,000 offer, the question whether the

judgment Barrow obtained is more favorable than Dr. Smith's offer may depend significantly on whether the offer includes court costs.

"Courts apply general contract principles to interpret Rule 68 offers of judgment." *Basha v. Mitsubishi Motor Credit of Am., Inc.*, 336 F.3d 451, 453 (5th Cir. 2003) (citing *Mallory v. Eyrich*, 922 F.2d 1273, 1279 (6th Cir. 1991), and *Radecki v. Amoco Oil Co.*, 858 F.2d 397, 400 (8th Cir. 1988)). In *Basha* the Fifth Circuit determined that the district court did not commit clear error in concluding that the offer of judgment included attorney's fees where "the circumstances surrounding the offer, if not the text itself, strongly support[ed] the view that the parties intended to settle all claims, including those for attorney's fees," even though the offer did not address attorney's fees explicitly. *Id.* at 453-54. The court considered extrinsic evidence in reaching its conclusion. It noted that defendants' counsel sent plaintiff's lawyer a letter one week before the offer's acceptance that stated "that the defendants agreed to 'pay an additional $2,000 in exchange for a full settlement of this matter with prejudice against these entities and a defense and indemnification as to any remaining parties to this lawsuit.'" *Id.* at 454. The court also observed that defendants' lawyer informed plaintiff by letter several days after the offer's acceptance "that the offer of judgment would 'conclude this case as to our clients.'" *Id.* The court concluded that "[t]hese two letters, and [plaintiff's] active role in preparing the offer, show that [defendants'] offer was a reflection of the parties' efforts to secure a settlement and dismissal of the entire claim." *Id.*

Basha supports the conclusion that an offer of judgment can include costs or attorney's fees even if it does not

mention them explicitly. Such a conclusion is also supported by the Seventh Circuit's decision in *Nordby v. Anchor Hocking Packaging Co.*, 199 F.3d 390 (7th Cir. 1999). In *Nordby* the court held that an offer of judgment that provided for "judgment in the amount of $56,003.00 plus $1,000 in costs as one total sum as to all counts of the amended complaint" unambiguously included attorney's fees, even though they were not mentioned. *Id.* at 391-92. It observed that the language "[o]ne total sum as to all counts of the amended complaint" could "only mean one amount encompassing all the relief sought in the counts," and it recognized that "[o]ne of those counts specified attorneys' fees as part of the relief sought." *Id.* at 392.

This court similarly concludes that Dr. Smith's offer unambiguously included court costs, even though they were not specifically mentioned in his offer. As stated earlier, the offer provides that the $100,000 offered "encompasses any and all items of damage and recovery sought by Plaintiff, including attorney's fees." Just as the court in *Nordby* concluded that the language of the offer in that case could "only mean one amount encompassing all the relief sought in the counts," this language can only mean one amount encompassing all items of damage and recovery that Barrow sought. Barrow clearly indicated in her first amended complaint – her operative complaint at the time Dr. Smith made his offer – that she sought to recover "all court costs and expenses incurred to bring this action." P. First Am. Compl. ¶ 5.5. Accordingly, the court concludes that Dr. Smith's $100,000 offer includes both court costs and attorney's fees. Because it does, for purposes of conducting the comparison called for by Rule 68, the court must compare Dr. Smith's offer to the value of the judgment Barrow obtained ($38,422.44), plus the value

of the sum of Barrow's pre-offer court costs and attorney's fees, to ensure the comparison of like "judgments."

To ensure that the policy objectives of 42 U.S.C. § 1988 are upheld, it is especially important to compare like "judgments" when a court is performing the Rule 68 comparison in a case brought under § 1983. This requires that pre-offer attorney's fees be considered in the Rule 68 comparison. *See Grosvenor,* 801 F.2d at 946-48 (discussing reasoning for including such fees in comparison of offer and judgment obtained). Excluding pre-offer attorney's fees and costs from the Rule 68 analysis would "strip [civil rights] plaintiffs of the benefits of § 1988, and would disregard the value to society of the effective enforcement of civil rights." *Id.* at 948. Accordingly, reasonably-incurred pre-offer costs and attorney's fees should be included as part of the judgment that Barrow finally obtained for purposes of determining whether the judgment is more favorable than Dr. Smith's offer.

Because Barrow's reasonably-incurred pre-offer costs and attorney's fees will be considered, the court is unable to determine at this time whether the "judgment finally obtained" is more favorable than Dr. Smith's offer. Because she was not required to do so, Barrow has not yet filed a fee application that enables the court to determine the value of her reasonable pre-offer costs and attorney's fees. Accordingly, Barrow must file a complete attorney's fee application within 20 days of the date this memorandum opinion and order is filed, delineating those fees and costs incurred before Dr. Smith's January 18, 2001 offer of judgment from those incurred afterward and delineating those fees and costs incurred before Dr. Smith's and

GISD's September 8, 2004 offer of judgment from those incurred afterward.[20] To reduce expenses and filing burdens, she may adopt and/or supplement materials already on file with the clerk provided (1) she clearly identifies by title and file date the materials adopted and/or supplemented, (2) clearly identifies the materials already on file and the new materials she is filing that she asks the court to review, and (3) clearly identifies (at least in her brief) the attorney's fees and costs that pre-date January 18, 2001 and September 8, 2004. In her brief, she must also cite materials already on file in the manner required by N.D. Tex. R. 7.2(e). The application (both as to any materials already on file and as to those filed in response to today's decision) must meet the usual standards that govern such fee applications and must allow the court to determine, not only what fees and costs were incurred, but

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[20] Mirroring the language in Dr. Smith's offer, defendants' September 8, 2004 offer in the amount of $154,666.00 states that the "lump-sum amount encompasses any and all items of damage and recovery sought by Plaintiff, including attorney's fees." Ds. Sept. 8, 2004 Offer of Judgment at 1. Because both Barrow's second amended complaint (the operative complaint as to GISD at the time of the offer) and her first amended complaint (the operative complaint as to Dr. Smith at the time of the offer) stated that Barrow was seeking to recover court costs, the court concludes, for reasons stated above, that the $154,666.00 amount specified in the offer included Barrow's pre-offer costs and attorney's fees. This conclusion is also supported by a form defendants attached to their offer entitled, "Acceptance by Plaintiff," which was apparently intended for Barrow's use to indicate her acceptance of defendants' offer. This form includes a sentence that provides, "I acknowledge that this lump-sum amount includes compensation for all damages, costs and attorney's fees." *Id.* at 4. This unequivocally manifests defendants' intent to include costs in the $154,666.00 sum specified. Accordingly, the nature of the comparison called for under Rule 68 will be the same as for Dr. Smith's January 2001 offer. If necessary, the court will conduct the appropriate Rule 68 analysis as to this offer once it has reviewed Barrow's fee application.

when they were incurred. Dr. Smith may file his response and brief within 20 days of the date the application is filed. He may also adopt materials already on file, provided he complies with the identification and briefing requirements specified for Barrow. Barrow may file a reply brief, but not new evidence, within 15 days after Dr. Smith's response and brief are filed. The court will consider the amount of Barrow's attorney's fee award after considering these materials and applying Rule 68 to the decisional process.

D

Now that the court has addressed monetary considerations pertinent to the comparison called for under Rule 68, it will turn to any non-monetary considerations that Barrow advances.

Barrow appears to argue that defendants' August 2000 offer of judgment was also less favorable than the judgment obtained because it failed to provide for equitable relief. Specifically, she avers that it did not offer to promote her, to restrict Dr. Smith's future unlawful conduct, or to remove Dr. Smith from the decisionmaking process for Barrow's future promotion applications or provide other equitable relief that she sought. She posits that in August 2000 Dr. Smith was still the GISD Superintendent and that GISD still had delegated to Dr. Smith the final authority to make interview and promotion recommendations. She also maintains that, at that time, Dr. Smith had never retracted his statement of July 30, 1998 to Barrow and her husband that she had "no future" as an administrator with GISD as long as her children attended the Greenville Christian School. Barrow also appears to

indicate that the Fifth Circuit's decision in *Barrow,* which she maintains is incorporated into the judgment via the court's charge, also shows that the judgment is more favorable than Dr. Smith's January 2001 offer.

The court declines to accept Barrow's apparent reliance on the failure of these offers to provide for equitable relief to show that the judgment is more favorable than the offers. The language of Rule 68 identifies the "judgment finally obtained" as the standard against which the court must compare the offer of judgment. *See* Rule 68 ("If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after making the offer."); *Johnston v. Penrod Drilling Co.,* 803 F.2d 867, 870 (5th Cir. 1986); *see also Spencer v. Gen. Elec. Co.,* 894 F.2d 651, 664 (4th Cir. 1990) ("[T]he unambiguous language of Rule 68 must be given its plain meaning and accordingly, in making the comparison required by the Rule, a trial court should consider only the terms of the 'judgment finally obtained' by the offeree, and nothing more."), *abrogated on other grounds by Farrar v. Hobby,* 506 U.S. 103 (1992). The judgment in the instant suit did not award equitable relief. Thus it is no more favorable in this respect than are defendants' or Dr. Smith's offers of judgment.

Additionally, it appears that Barrow has directed the court to conditions that existed at the time of defendants' August 2000 offer to show that this litigation has remedied adverse conditions that defendants did not offer to correct. Even if the litigation has yielded positive results not addressed either in defendants' or Dr. Smith's offers of judgment, these results are not part of the judgment Barrow obtained. *See Spencer,* 894 F.2d at 663 (holding that district court erred in including non-judgment relief

as part of judgment plaintiff finally obtained in determining whether judgment was more favorable than offer of judgment); *Jolly,* 1999 WL 20895, at *9 (observing that "Rule 68 makes no provision for the comparison of those aspects of the case that are not reflected in the judgment" and noting that the comparison should not be "between the offer and any other relief [besides the judgment obtained] that may have resulted from the litigation process."). Consequently, the court will not consider them in determining the legal effect of Dr. Smith's offers of judgment. The court likewise will not take into account the Fifth Circuit's decision in *Barrow* in determining whether the judgment obtained is more favorable than Dr. Smith's offer. The decision in *Barrow* was not incorporated into the judgment via the court's charge, as Barrow contends, and is therefore not part of the "judgment finally obtained."

VI

Dr. Smith requests that the court award him reasonable attorney's fees against Barrow and her counsel under § 1988. The court declines this request.

A

"Prevailing defendants are entitled to attorneys' fees under . . . section 1988 only upon a showing that the plaintiff's action was frivolous, unreasonable, groundless, or made in bad faith, or that the plaintiff continued to litigate after it clearly became so." *Trevino v. Holly Sugar Corp.,* 811 F.2d 896, 906 (5th Cir. 1987). Dr. Smith asserts three different reasons for why he is entitled to attorney's fees. First, he contends that Barrow voluntarily dismissed claims against him under Title VII, Chapter 110, Article I,

§ 6 of the Texas Constitution ("Article I, § 6"), and the claims against him in his official capacity, to avoid an unfavorable judgment on the merits. He argues that each claim was frivolous, groundless, or without merit. Second, he contends that Barrow's free exercise claim, while not dismissed voluntarily, was frivolous, groundless, or without merit. Third, he posits that Barrow's pursuit of her parental rights claim became frivolous after she rejected offers of judgment that would have made her whole.

B

Barrow contends that she prevailed on her primary claim concerning her constitutional right to exercise her choice to provide a private religious education for her children without employment discrimination by Dr. Smith. She urges that all of her causes of action were interrelated with her constitutional claims pertaining to her parental rights, and that Dr. Smith did not prevail on any distinct claims that were not related to her central contentions surrounding her legal rights as a parent. She argues that only claims that are based on different facts and legal theories can be considered unrelated to each other so as to allow a defendant to recover attorney's fees when a plaintiff succeeds in the litigation.

"Only a 'prevailing party' in a civil rights action is eligible for an award of attorney's fees under section 1988." *Associated Builders & Contractors, Inc. v. Orleans Parish Sch. Bd.*, 919 F.2d 374, 377 (5th Cir. 1990). "To qualify as a prevailing party, the plaintiff must (1) obtain actual relief, such as an enforceable judgment or a consent decree; (2) that materially alters the legal relationship between the parties; and (3) modifies the defendant's behavior in a way

that directly benefits the plaintiff at the time of the judgment or settlement." *Walker v. City of Mesquite,* 313 F.3d 246, 249 (5th Cir. 2002) (citing *Farrar,* 506 U.S. at 111-12). Based on this definition, there can be no doubt that Barrow is a prevailing party in this case in relation to Dr. Smith. She prevailed on her parental rights claim and obtained a judgment for compensatory and punitive damages.

Despite this, Dr. Smith may still be entitled to recover attorney's fees if he can show not only that Barrow failed on claims that were unrelated to her parental rights claim but that these unrelated claims were frivolous. *See Hensley v. Eckerhart,* 461 U.S. 434, 435 & n.10 (1983); *Uviedo v. Steves Sash & Door Co.,* 753 F.2d 369, 370-71 (5th Cir. 1985). In *Uviedo* the Fifth Circuit explained that

> a plaintiff's claims which are unrelated to each other, though formally and properly joined in a single suit against a single defendant, are nevertheless to be considered for attorneys' fees purposes as if each were brought in a separate suit, so that a party's success or failure on one claim is not to be considered in determining that party's entitlement (or vulnerability) to attorneys' fees on an unrelated claim.

Uviedo, 753 F.2d at 370-71. The court explicitly noted *Hensley*'s language that "[t]he congressional intent to limit [attorneys' fees] awards to prevailing parties requires that these unrelated claims be treated as if they had been raised in separate lawsuits, and therefore no fee may be awarded for services on the unsuccessful claim," and that "[i]f the unsuccessful claim is frivolous, the defendant may recover attorney's fees incurred in responding to it[.]" *Id.* at 371 (quoting *Hensley,* 461 U.S. at 435 & n.10) (alteration in

original). Although the Court in *Hensley* recognized "that there is no certain method of determining when claims are 'related' or 'unrelated,'" *Hensley,* 461 U.S. at 437 n.12, it did appear to suggest that those claims "based on different facts and legal theories" would be considered "unrelated," while those that "involve a common core of facts" or are "based on related legal theories" are "related," *id.* at 434-35.

The court concludes that all of Barrow's claims were sufficiently related to her parental rights claim as to prevent Dr. Smith from recovering attorney's fees under § 1988 as a prevailing party. Each claim depended on the same set of factual circumstances: Dr. Smith's refusal to consider her for the position of Assistant Principal because she would not enroll her children in public school. Because Barrow's claims were all sufficiently related, the court need not decide whether they were frivolous.

C

Dr. Smith also argues that he is entitled to attorney's fees because Barrow's parental rights claim became frivolous after she rejected his and GISD's offers of judgment. The court disagrees. Dr. Smith is not entitled to attorney's fees with respect to Barrow's parental rights claim because, as the court has explained, Barrow, not Dr. Smith, prevailed on this claim. *See Albright v. Good Shepherd Hosp.,* 901 F.2d 438, 440 (5th Cir. 1990) ("To obtain attorney's fees under [§ 1988], a litigant must be a 'prevailing party.'"). The court rejected this same argument in *Barrow III* in denying his motion for summary judgment. In doing so, the court noted that Dr. Smith had not "obtained dismissal of Barrow's lawsuit and [had] not

demonstrated how her rejection of his settlement offers entitles him to 'prevailing party' status." *Barrow III,* 2005 WL 39086. at *9. Dr. Smith lost on Barrow's parental rights claim and has still not demonstrated why rejection of his settlement offers alone entitles him to "prevailing party" status.

For the foregoing reasons, the court concludes that Dr. Smith is not entitled to recover attorney's fees under § 1988, and it denies his motion.

VII

GISD also moves for an award of attorney's fees. It appears to contend that it is entitled to such fees under § 706(k) of Title VII and § 1988, asserting that the court has discretion under these authorities to grant attorney's fees to a prevailing defendant on a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in bad faith.

A

Among her arguments, Barrow asserts the same contentions as she did in relation to Dr. Smith's motion for attorney's fees: that she prevailed on her primary claim concerning her constitutional right to exercise her choice of private religious education for her children, that all her claims were interrelated to her parental rights claim, and that only claims based on different facts and legal theories can be considered unrelated so as to allow a defendant to recover attorney's fees. The court disagrees. Although Barrow prevailed against Dr. Smith with respect to her parental rights claim, she did not prevail against GISD on that claim. Barrow has not cited any authority to suggest

that her success against Dr. Smith can be imputed against GISD for purposes of determining whether GISD is entitled to attorney's fees under § 706(k) or § 1988. The court concludes that she cannot. Accordingly, Barrow's success against Dr. Smith does not prevent GISD from recovering attorney's fees.

B

GISD is only eligible for attorney's fees under § 706(k) or § 1988 if it can show that it was a prevailing party, *see Associated Builders,* 919 F.2d at 377; *Falcon v. General Telephone Co.,* 815 F.2d 317, 322 (5th Cir. 1987), and that Barrow's "action was frivolous, unreasonable, groundless, or made in bad faith,[21] or that [she] continued to litigate after it clearly became so[,]" *Trevino,* 811 F.2d at 906. In determining whether the latter showing has been made, the court focuses on whether a claim "was void of arguable legal merit or factual support" instead of "whether the claim was ultimately successful." *Jones v. Tex. Tech Univ.,* 656 F.2d 1137, 1145-46 (5th Cir. Unit A Sept. 1981). The court "should look to factors such as whether the plaintiff established a *prima facie* case, whether the defendant offered to settle, and whether the court held a full trial." *Myers v. City of W. Monroe,* 211 F.3d 289, 292 (5th Cir. 2000) (citing *United States v. Mississippi,* 921 F.2d 604, 609 (5th Cir. 1991)). GISD argues that Barrow's claims under § 1983, Title VII, § 110, and Article I, § 6 were unreasonable, without foundation, or frivolous. The court will address each claim in turn.

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[21] GISD does not appear to rely on allegations that Barrow made her claims in bad faith.

1

There is no question that GISD is a prevailing party on Barrow's § 1983 claim. The court granted summary judgment in part as to this claim and the jury decided in GISD's favor as to the balance of the claim at trial. GISD is not entitled to attorney's fees, however, because the court is unable to conclude that the claim was unreasonable, groundless, or frivolous.

In deciding GISD's motion for summary judgment, the court held, in pertinent part, that she had "produced evidence that is sufficient to raise a genuine issue of material fact concerning whether the alleged constitutional violations occurred pursuant to a custom or practice of GISD." *Barrow II,* 2002 WL 628665, at *6. Because she in part met her burden at the summary judgment stage, Barrow was entitled to, and received, a trial on the issue. Additionally, the court declined to grant judgment as a matter of law dismissing her § 1983 cause of action after she rested her case-in-chief. Under these circumstances, the court concludes that her claim was not groundless, unreasonable, or frivolous and that GISD is not entitled to recover attorney's fees incurred in defending Barrow's § 1983 claim.

2

GISD is also a prevailing party on Barrow's Title VII claim. The court granted summary judgment with respect to Barrow's disparate treatment and impact claims on GISD's motion, and the jury ruled in its favor on Barrow's religious accommodation claim. Although Barrow ultimately lost on her Title VII claim, she survived a motion for judgment as a matter of law at trial, and her Title VII

claim was submitted to the jury for determination. Accordingly, the court cannot say that it was groundless, unreasonable, or frivolous. GISD is therefore not entitled to attorney's fees on this claim.

3

GISD is also not entitled to attorney's fees for defending against Barrow's state statutory and constitutional claims. In its motion, GISD does not appear to move for attorney's fees pursuant to Texas law, and §§ 1988 and 706(k) do not explicitly provide for the recovery of attorney's fees incurred in the defense of pendent state-law claims. Although the Fifth Circuit has at least once upheld the award of attorney's fees under § 1988 to a defendant on a federal civil rights claim and a state-law claim, it did so where the defendant was entitled to attorney's fees on the civil rights claim because it was "frivolous, unreasonable, and groundless." *See Church of Scientology v. Cazares,* 638 F.2d 1272, 1290 (5th Cir. Mar. 1981). In this case, GISD is not entitled to attorney's fees on Barrow's federal claims. GISD has not cited the court to any authority in this circuit, and the court has found none on its own, that supports a recovery of attorney's fees by a defendant under either § 1988 or § 706(k) for defending against state-law claims where the defendant was not otherwise entitled to recover fees under these statutes for federal-law claims. Accordingly, the court declines to award attorney's fees to GISD for defending against Barrow's § 110 and Texas constitutional claims.

VIII

The court turns finally to Barrow's request that the court schedule a *Dondi*[22] conference with her counsel and Dr. Smith's counsel. She argues that Dr. Smith's counsel made numerous personal attacks against her and her attorneys in Dr. Smith's motion for attorney's fees and brief that are false, slanderous, and unprofessional. The court concludes that a *Dondi* conference is not warranted. Having reviewed the pages in Dr. Smith's brief on which Barrow relies, the court does not agree that they contain personal attacks. Rather, on these pages Dr. Smith appears to make a proffer of evidence that he intends to present on the issue of who should be charged his attorney's fees, if the court decides to award them. Accordingly, a *Dondi* conference is unnecessary, and Barrow's request is denied.

* * *

In sum, GISD's April 6, 2005 motion for attorney's fees is denied. Dr. Smith's April 8, 2005 motions for new trial, for judgment as a matter of law, to alter or amend judgment, and for attorney's fees are denied. Barrow's May 5, 2005 request for *Dondi* conference is denied. Barrow's April 11, 2005 post-trial motion to alter or amend judgment and motion for judgment as a matter of law are denied except to the extent the court has deferred ruling on them due to the outstanding issue of Barrow's recovery of attorney's fees and costs. The court also defers a decision on Barrow's April 11, 2005 preliminary motion for

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[22] *Dondi Props. Corp. v. Commerce Sav. & Loan Ass'n*, 121 F.R.D. 284 (N.D. Tex. 1988) (en banc) (per curiam).

attorney's fees and defers deciding her April 13, 2005 objections to GISD's bill of costs.

The additional submissions required by this memorandum opinion and order are set out *supra* at § V(C)(2).

SO ORDERED.

August 5, 2005

/s/ Sidney A. Fitzwater
SIDNEY A. FITZWATER
UNITED STATES
DISTRICT JUDGE

KAREN JO BARROW, Plaintiff, VS. GREENVILLE INDEPENDENT SCHOOL DISTRICT, et al., Defendants.

Civil Action No. 3:00-CV-0913-D

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION

2002 U.S. Dist. LEXIS 6785

April 17, 2002, Decided
April 18, 2002, Filed

COUNSEL: for KAREN JO BARROW, plaintiff: Wm Charles Bundren, Attorney at Law, Wm Charles Bundren & Associates, Dallas, TX USA.

For GREENVILLE INDEPENDENT SCHOOL DISTRICT, defendant: Dennis J Eichelbaum, Attorney at Law, Schwartz & Eichelbaum, Plano, TX USA.

For GREENVILLE INDEPENDENT SCHOOL DISTRICT, defendant: Cobby A Caputo, Attorney at Law, Schwartz & Eichelbaum, Austin, TX USA.

JUDGES: SIDNEY A. FITZWATER, UNITED STATES DISTRICT JUDGE.

OPINION BY: SIDNEY A. FITZWATER

OPINION

MEMORANDUM OPINION AND ORDER

Plaintiff Karen Jo Barrow ("Barrow") sues defendant Greenville Independent School District ("GISD") under 42 U.S.C. § 1983 alleging violations of federal constitutional rights and of Title VII of the Civil Rights Act of 1964, 42

U.S.C. § 2000e *et seq.* She also brings causes of action arising under Title V of the Texas Civil Practice and Remedies Code and Article I, § 6 of the Texas Constitution. Barrow asserts that the GISD Superintendent of Schools refused to consider her for the position of middle school Assistant Principal unless she placed her children – who attended a private Christian school – in public school. On GISD's motion for summary judgment, the court holds that Barrow has raised a genuine issue of material fact concerning whether GISD deprived her of federal rights under a custom and practice and declines to dismiss her § 1983 claims. The court holds that GISD is entitled to summary judgment dismissing her Title VII cause of action except to the extent she asserts a reasonable accommodation claim. The court dismisses Barrow's state-law claim for injunctive relief but otherwise denies the part of GISD's motion that pertains to her state-law causes of action.

I

During the period relevant to this lawsuit, Barrow was a classroom teacher employed by GISD who was eligible and qualified to hold the position of Assistant Principal. Her school age children were students at the Greenville Christian School, a private religious school. Barrow alleges that her federal constitutional rights were violated when Dr. Herman Smith ("Dr. Smith"), then the GISD Superintendent, refused to consider, interview, or recommend her to the GISD Board of Education for a school administrator position unless she enrolled her

children in public school.[1] In her first amended original complaint ("amended complaint"), Barrow alleges that GISD abridged the following federal constitutional rights: (1) the right under the First and Fourteenth Amendments to protection of family relationships, the right to direct one's children's educations, and the right of familial privacy (count I); (2) the liberty interest and due process right under the Fourteenth Amendment Due Process Clause to make decisions concerning familial relationships and practices, including the direction and control of one's children's education (count II); and (3) the right under the First Amendment Free Exercise Clause to the free exercise of one's religious faith by choosing to educate one's children in a religious educational institution according to that faith (count III). Barrow additionally asserts that she suffered an adverse employment action because of religious discrimination, in violation of Title VII (count V).

II

The court first considers whether GISD can be held liable under § 1983 for alleged violations of Barrow's constitutional rights. Barrow asserts that Dr. Smith stated that he would not consider her for promotion to an administrative position with GISD if she chose to educate her school-age children in a private school. She alleges that Dr. Smith employed this criterion with regularity in

[1] Barrow alleges that she was informed that "she would be required to remove her children from their private Christian education and to place them in a public school education within the independent school district where she resided." P. Am. Compl. at ¶ 6.29; *see id.* ¶ 6.32 ("in either the [GISD] or another independent school district but not in private education").

determining whom to interview, and whom to recommend, for available GISD administrative positions. Barrow also contends that for, purposes of assessing § 1983 liability against GISD under *Monell v. Department of Social Services,* 436 U.S. 658, 689 (1978), Dr. Smith was a policymaker with respect to decisions concerning whom to hire or whom to interview for administrative positions.

A

A governmental entity such as GISD can be sued and subjected to monetary damages and injunctive relief under 42 U.S.C. § 1983 only if its official policy or custom causes a person to be deprived of a federally protected right. *See Board of County Comm'rs of Bryan County, Okla. v. Brown,* 520 U.S. 397, 403 (1997); *Monell,* 436 U.S. at 694. A governmental entity cannot be liable for civil rights violations under a theory of *respondeat superior* or vicarious liability. *See Monell,* 436 U.S. at 694; *see also Baskin v. Parker,* 602 F.2d 1205, 1208 (5th Cir. 1979). Official policy is defined as:

> 1. A policy statement, ordinance, regulation, or decision that is officially adopted and promulgated by the [district] . . . or by an official to whom the [district] has delegated policy-making authority; or
>
> 2. A persistent, widespread practice of [district] officials or employees, which, although not authorized by officially adopted and promulgated policy, is so common and well settled as to constitute a custom that fairly represents [district] policy. Actual or constructive knowledge of such custom must be attributable to the governing

> body of the district or to an official to whom that body had delegated policy-making authority.

Eugene v. Alief Indep. Sch. Dist., 65 F.3d 1299, 1304 (5th Cir. 1995) (alterations in original) (citing *Johnson v. Moore*, 958 F.2d 92, 94 (5th Cir. 1992)); *see also Webster v. City of Houston*, 735 F.2d 838, 841 (5th Cir. 1984) (en banc) (per curiam).

A plaintiff must identify the purported policy said to constitute a violation of her rights, show that the policy is attributable to the governmental entity itself, and establish that she incurred her injury because of the application of that specific policy. *See Bennett v. City of Slidell*, 728 F.2d 762, 767 (5th Cir. 1984) (en banc). She must demonstrate that the governmental entity, through its deliberate conduct, was the moving force behind the injury or harm suffered, and she must establish a direct causal link between the governmental entity's action and the deprivation of a federally protected right. *Bryan County*, 520 U.S. at 403-04.

Liability must rest on official policy, meaning the governmental entity's policy, not the policy of an individual official. *Bennett*, 728 F.2d at 769. The official complained of must possess

> final authority to establish [school district] policy with respect to the action ordered. . . . The official must also be responsible for establishing final government policy respecting such activity before the [school district] can be held liable. . . . Whether an official had final policymaking authority is a question of state law.

Pembaur v. City of Cincinnati, 475 U.S. 469, 481-82 (1986).

Under Texas law, the final policymaking authority in an independent school district rests with the district's trustees. *See Jett v. Dallas Indep. Sch. Dist.*, 7 F.3d 1241, 1245 (5th Cir. 1993). An employee, agency, or board of a governmental entity is not a policymaker unless the governmental entity, through its lawmakers, has delegated exclusive policymaking authority to that employee, agency, or board and cannot review the action or decision of the employee, agency, or board. *See City of St. Louis v. Praprotnik,* 485 U.S. 112, 130 (1988); *Worsham v. City of Pasadena,* 881 F.2d 1336, 1340-41 (5th Cir. 1989). In *Jett* the Fifth Circuit held that, under the Texas Education Code, the School Board, rather than the Superintendent, is the policymaking authority for the school district absent specific contrary arrangements. *See Jett,* 7 F.3d at 1245.

Although in her brief she intermixes and repeats several arguments to contend that Dr. Smith is a final policymaker whose decision is attributable to GISD, *see* P. Br. at 6-16, Barrow appears to advance reasoning that can be grouped and addressed in these three parts: (1) Dr. Smith was a final policymaker in July 1998 with respect to the hiring process for new administrators for GISD, under Tex. Educ. Code Ann. § 11.201(d)(3) (Vernon Supp. 2002); (2) the GISD Board merely rubber-stamped his recommendations, its power was limited merely to accepting or rejecting such recommendations, and it was no more than the titular decisionmaker; and (3) Dr. Smith's edicts and acts were final decisions of GISD because, although the Board retained the authority to create the position of Assistant Principal, it delegated to the Superintendent alone the final authority to select the person who would fill it. Barrow also argues that, even if Dr. Smith is not deemed a final policymaker, GISD is nevertheless liable

under § 1983 because (1) the allegedly discriminatory acts occurred pursuant to "a persistent, widespread practice" of GISD employees, including Dr. Smith; and (2) because the GISD Board exhibited a "deliberate indifference" to Barrow's constitutional rights by *inter alia* failing to properly train and supervise Dr. Smith in the protection of these rights.

B

In advancing the argument that Dr. Smith functioned as a final policymaker in his capacity as GISD Superintendent, Barrow argues that the Fifth Circuit's holding in *Jett* does not apply to this case, in part because of subsequent changes to the Texas Education Code. *See* P. Br. at 25-27. After examining the present statutory scheme governing school district management, including Tex. Educ. Code Ann. § 11.201(d)(3) (Vernon Supp. 2002), the court concludes that Jett's result also applies to the present case, even under the revised Texas Education Code. The court agrees with Judge Lindsay's decision in *Texas State Teachers Ass'n v. Mesquite Independent School District*, 2001 U.S. Dist. LEXIS 13322, 2001 WL 1029514, at *3 (N.D. Tex. Aug. 23, 2001) (Lindsay, J.), that "the determination in *Jett* that the Board is the final policymaking authority was based on a number of provisions in the Education Code. There have been changes since the events at issue in *Jett*, but not so significant as to change the conclusion."[2] Applying reasoning similar to that followed in *Texas State Teachers Ass'n*, the court holds

[2] For an elaboration of the reasoning behind this conclusion, *see Texas State Teachers Ass'n*, 2001 U.S. Dist. LEXIS 13322, 2001 WL 1029514 at *3-*4.

that, under the revised Texas Education Code, the GISD Board – not the Superintendent – establishes policy concerning the eligibility requirements for a person to be interviewed for an administrator position. In fact, the summary judgment record indicates that the GISD Board considered an official policy requiring that applicants enroll their school-age children in the GISD, but ultimately decided against adopting such a policy. *See* D. App. 327-28, 330-37.

Given the Texas statutory scheme, Dr. Smith may be deemed a policymaker only if the Board had specifically delegated authority to him, the exercise of which was final and not subject to Board review. *See Worsham,* 881 F.2d at 1340-41. Based on the record evidence, the court concludes as a matter of law[3] that the GISD did not delegate such final policymaking authority to Dr. Smith.

Barrow's evidence that the Board "rubber stamped" job applicants recommended by the Superintendent, *see, e.g.,* P. App. 2897-2945,[4] does not establish such a delegation. "Except perhaps as a step towards overruling *Monell* and adopting the doctrine of *respondeat superior,* ad hoc searches for officials possessing such '*de facto*' authority would serve primarily to foster needless unpredictability in the application of § 1983." *Jett,* 7 F.3d at 1247 n.10

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[3] *See Gros v. City of Grand Prairie, Tex.,* 181 F.3d 613, 616-17 (5th Cir. 1999).

[4] In her brief, Barrow cites over 1200 pages of the record in support of this assertion, *see* P. Br. at 15 (citing P. App. 1070-1572, 2144-2896, 2897-2945), in violation of N.D. Tex. Civ. R. 56.5(c). *See Andrews v. CompUSA, Inc.,* 2002 U.S. Dist. LEXIS 2953, 2002 WL 265089, at *3 (N.D. Tex. Feb. 21) (Fitzwater, J.), *appeal docketed,* No. 02-10364 (5th Cir. Mar. 26, 2002), and discussion *infra.*

(quoting *Praprotnik,* 485 U.S. at 129). The court notes that many cases that Barrow cites in support of her contention that GISD may be held liable for Dr. Smith's actions because of its history of "rubber stamping" his employment recommendations deal with the standard for assessing liability under Title VII or the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 *et seq. See* P. Br. 9-12 (citing *Rios v. Rossotti,* 252 F.3d 375, 382 (2001); *Russell v. McKinney Hosp. Venture,* 235 F.3d 219, 225 (2000)). Although, as Barrow argues, Dr. Smith may have been the *de facto* decisionmaker regarding which candidates were selected to be interviewed for GISD administrative positions, this practical circumstance does not elevate him to the status of policymaker for purposes of assessing liability under § 1983. As the Fifth Circuit stated in *Jett:*

> That Superintendent Wright may have been delegated the final decision in the cases of protested individual employee transfers does not mean that he had or had been delegated the status of policymaker, much less final policymaker, respecting employee transfers. In *Pembaur* and *Praprotnik* the Court carefully distinguished between those having mere *decisionmaking* authority and those having *policymaking* authority. . . . "'The fact that a particular official – even a policymaking official – has discretion in the exercise of particular functions does not, without more, give rise to municipal liability based on an exercise of that discretion.'"

Jett, 7 F.3d at 1246-47 (quoting *Pembauer,* 475 U.S. at 481-82). Texas law and the facts present in the record conclusively indicate that, here, with respect to deciding which

candidates to interview, Dr. Smith functioned as a decision-maker rather than as a policymaker. Consequently, the court holds that Dr. Smith's edicts and acts of which Barrow complains did not constitute final policy of the GISD pursuant to a delegation of authority or otherwise.

C

Although Dr. Smith did not function as a policymaker, Barrow may continue with her § 1983 action against GISD if the summary judgment evidence raises a genuine issue of material fact concerning whether it was a "custom or practice" within the GISD to exclude from promotion to administrator any applicant who chose to educate her children in a private school.[5] She must raise a genuine

[5] Barrow makes one argument in her brief that reflects a misunderstanding of the parties' summary judgment burdens. She contends "the District failed to meet its stringent summary judgment requirements by proving that, as a matter of law, it did not, in July of 1998, have a custom or practice of refusing to consider or interview job applicants for administrative positions who chose religious or private education for their children." P. Br. at 17. Because Barrow will have the burden of proving at trial that she was deprived of a constitutional right pursuant to a GISD policy or custom, GISD can meet its summary judgment obligation by pointing the court to the absence of evidence to support this element of her claim. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). Once it does so, the Barrow must then go beyond her pleadings and designate specific facts showing that there is a genuine issue for trial. *See id.* at 324; *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (en banc) (per curiam). Summary judgment is mandatory if she fails to meet this burden. *Little*, 37 F.3d at 1076. Her failure to adduce proof on any essential element of her § 1983 claim renders all other facts immaterial. *See Celotex Corp.*, 477 U.S. at 323. Accordingly, Barrow is mistaken in contending that to obtain summary judgment based on the absence of a policy or custom, it must meet the stringent summary judgment requirement of proving that, as a matter of law, it did not have one in July of 1998. Instead, it need only point the court to the absence of evidence of a policy or custom and the burden shifts to

(Continued on following page)

issue of material fact concerning the presence of "[a] persistent, widespread practice of [district] officials or employees, which, although not authorized by officially adopted and promulgated policy, is so common and well settled as to constitute a custom that fairly represents [district] policy." *Eugene,* 65 F.3d at 1304 (alterations in original).

1

Barrow makes the conclusory assertion that "[t]he evidence of the District's custom or practice is established by the testimony of many of the Board members and administrators who have explained the bias and prejudice that the District has toward[ ] applicants for administrative positions who choose to educate their children in religious or private schools instead of the District's public schools." P. Br. at 17. This contention is followed by a string citation to five segments of the record, encompassing 1,828 pages. The balance of the argument cites "*Id.*" once, cites four other parts of the record in groups of 11, 42, 87, and 72 pages, and does not otherwise cite the record. *See* P. Br. at 17-18. GISD has objected to global citations contained within Barrow's brief as placing an unreasonable burden on it and the court in evaluating Barrow's argument. *See* D. Rep. Br. at 8. Even excluding the citation to pages 116-1690 of the record-which is probably a typographical error[6] – the citation directs the

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Barrow to introduce evidence that would permit a reasonable trier of fact to find in her favor on this element of her claim.

[6] In the course of making its objection, GISD explicitly notified Barrow of the likelihood of her typographical error. *See id.* Barrow has not made any attempt to clarify the citation in question.

court to review 253 pages of the record, including the entirety of three depositions and of Barrow's personal affidavit. Even taking into account the broad scope of the matter that Barrow is attempting to prove, this far-reaching citation nevertheless clearly violates settled summary judgment jurisprudence and this court's local civil rules. This court is not required to "comb the record" in search of a genuine issue of material fact. "Rule 56 does not impose a duty on the district court to sift through the record in search of evidence to support a party's opposition to summary judgment." *Doddy v. Oxy USA, Inc.,* 101 F.3d 448, 463 (5th Cir.1996) (citing *Jones v. Sheehan, Young & Culp, P.C.,* 82 F.3d 1334, 1338 (5th Cir.1996)). "Rule 56, therefore, saddles the non-movant with the duty to 'designate' the specific facts in the record that create genuine issues precluding summary judgment, and does not impose upon the district court a duty to survey the entire record in search of evidence to support a non-movant's opposition." *Jones,* 82 F.3d at 1338. N.D. Tex. Civ. R. 56.5(c) requires "[a] party whose . . . response is accompanied by an appendix [to] include in [her] brief citations to each page of the appendix that supports each assertion that the party makes concerning the summary judgment evidence." To the extent the court has inquired into the parts of the record that Barrow has cited, the court agrees with GISD's summary of the evidence, *see* D. Rep. Br. at 8, and holds that the proof is insufficient to raise a genuine issue of material fact concerning the custom or practice of GISD.

2

Barrow also argues that the GISD Board took no action on learning that she had been subjected to religious

discrimination, and thus was "deliberately indifferent" to the alleged constitutional violations that Dr. Smith implemented. *See* P. Br. at 20-23.[7] She states that within days of learning that GISD had hired another person as Assistant Principal, she contacted a majority of the School Board members and informed them what Dr. Smith had said about District custom and policy of refusing to interview administrator applicants whose children were not enrolled in the District's schools and what he had done to discriminate against her. *See* P. Br. at 21 (citing P. App. 2952-2958). She contends that a majority of the Board knew that Dr. Smith had told her she was not considered for the position of Assistant Principal because she educated her children at Greenville Christian School and that she would have no future as a District administrator while she continued to educate them there instead of the GISD public schools. In support of this contention, she has adduced evidence that she spoke personally with Board President LaDayne Wilson and with Board members Randy Tarpley, Kevin Green, Steven Mitchell, and Janie Busby and informed them of Dr. Smith's alleged acts of discrimination. *See* P. App. 2952-54. Based on these contacts, Barrow argues that a majority of the Board was on notice of the Superintendent's interpretation of the

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[7] Barrow's briefing on this point includes several citations that violate Rule 56.5(c). Despite this briefing error, she has properly designated sufficient record evidence to raise a genuine issue of material fact regarding deliberate indifference. The court need not, therefore, address the other arguments on which she relies to establish that her constitutional rights were violated pursuant to a GISD custom or practice. *See id.* at 18-19. Nor, for the same reason, must it address her argument that, even if summary judgment is granted with respect to a damages claim under § 1983, her suit for prospective declaratory and injunctive relief is entitled to proceed. *See id.* at 23-25.

District's policies, customs, and practices. Barrow argues that, afterwards, her counsel advised each Board member that she had been subjected to religious discrimination, the District employed counsel to investigate her claims, and the Board responded by doing nothing. *See id.* at 2954, 741-50. She cites the Board's response to the inquiry from the Equal Employment Opportunity Commission in which it said that one factor that would be considered in interviewing her was where she chose to educate her children. *See* P. App. 852. Barrow maintains that, even after District personnel gave sworn testimony concerning Dr. Smith's actions, the Board did nothing, and that it has not repudiated his conduct and statements, disciplined him for his actions and conduct toward Barrow, or modified its policies or adopted a policy that would prohibit such discrimination, as of the date she filed her summary judgment response.

The Fifth Circuit has held that where the final policy making body of a governmental entity acquires actual knowledge of an allegedly unconstitutional custom practiced by an employee, such knowledge may form the basis for § 1983 liability. "Actual knowledge may be shown by such means as discussion at council meetings or receipt of written information." *Bennett,* 728 F.2d at 768. Barrow has adduced evidence of written and oral communications with Board members sufficient to support a reasonable finding that the Board had actual knowledge of Dr. Smith's conduct and rationale that Barrow challenges as unconstitutional. She has produced evidence that is sufficient to raise a genuine issue of material fact concerning whether the alleged constitutional violations occurred pursuant to a

custom or practice of GISD.[8] The court therefore denies GISD's motion for summary judgment with respect to Barrow's claims asserted through the procedural mechanism of § 1983.[9]

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[8] In a related argument, Barrow asserts that the Board's failure to take action following notice of Dr. Smith's failure to promote her subjects GISD to liability for Dr. Smith's allegedly unconstitutional acts based on a "failure to train" theory. *See* P. Br. at 47-48. Barrow contends first that "the district failed to move for summary judgment on Barrow's Fourteenth Amendment 'deliberate indifference' claim[.]" *Id.* at 47. The court disagrees. GISD's motion and brief clearly indicate that GISD has moved for summary judgment on all claims asserted under § 1983. *See* D. Mot. at 1. To hold a governmental entity liable under § 1983 based on a policy of improperly training or hiring employees, a plaintiff must prove that (1) the training or hiring procedures of the entity's policymaker were inadequate; (2) its policymaker was deliberately indifferent in adopting the hiring or training policy; and (3) the inadequate training and hiring policy directly caused the plaintiff's injury. *City of Canton, Ohio v. Harris*, 489 U.S. 378, 388-89 (1989); *Baker v. Putnal*, 75 F.3d 190, 200 (5th Cir. 1996). Regarding the period preceding Dr. Smith's July 1998 promotion decision, Barrow has introduced no evidence from which a reasonable trier of fact could find that GISD was deliberately indifferent as to its training or supervision of Dr. Smith concerning the religious rights of prospective job applicants. Concerning the period after which the Board became aware of the July 1998 promotion decision affecting Barrow, there is no genuine issue of material fact concerning whether the allegedly inadequate training policy directly caused Barrow's injury. Moreover, given the court's holding concerning the qualified nature of the religious rights that Barrow has asserted, *see Barrow v. Greenville Independent School District*, 2002 U.S. Dist. LEXIS 2792, 2002 WL 255484, at *2-*5 (N.D. Tex. Feb. 20) (Fitzwater, J.), *appeal docketed*, No. 02-10351 (5th Cir. Mar. 22, 2002), Barrow has not adduced evidence that demonstrates a genuine issue of material fact as to whether the training procedures of GISD regarding the protection of the religious rights of prospective job applicants were inadequate during any time period.

[9] GISD moved for summary judgment based on the absence of evidence of a GISD policy, custom, or practice. The court thereafter addressed certain substantive issues in the context of Dr. Smith's motion for summary judgment based on qualified immunity. *See*

(Continued on following page)

III

Barrow sues GISD under Title VII asserting that she was subjected to disparate treatment because of her religion.

A

Barrow may prove her Title VII claim based on direct evidence or by using the indirect *McDonnell Douglas*[10] method of proof. *See LaPierre v. Benson Nissan, Inc.*, 86 F.3d 444, 448 (5th Cir. 1996) (race discrimination case). She contends that Dr. Smith's comments concerning her request for promotion provide direct evidence of intentional discrimination. The court disagrees. "Direct evidence is evidence which, if believed, proves the fact [of intentional discrimination] without inference or presumption." *Portis v. First Nat'l Bank*, 34 F.3d 325, 328-29 (5th Cir. 1994) (quoting *Brown v. East Miss. Elec. Power Ass'n*, 989 F.2d 858, 861 (5th Cir. 1993)). "In the context of Title VII, direct evidence includes any statement or written document showing a discriminatory motive on its face." *Id.* 34 F.3d at 329. Viewing all evidence in the light most favorable to Barrow as the nonmovant, the court holds that she has presented proof only that Dr. Smith sought to discourage or prevent GISD administrators from enrolling their school-age children in any private school, whatever its religious affiliation. *See, e.g.*, P. App. 685-96, 2952.

Barrow, 2002 U.S. Dist. LEXIS 2792, 2002 WL 255484. The court does not intend, by denying summary judgment on the narrow ground that GISD presents in its motion, to vary any of the reasoning followed in *Barrow*.

[10] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

Barrow's own deposition testimony confirms this view of Dr. Smith's motives. *See* D. App. 274-78, 284-86, 292-94 (reproducing Barrow's testimony stating her view that, under Dr. Smith's requirements, she would remain ineligible for promotion to middle school Assistant Principal so long as her school-age children attended any private school, or engaged in any type of schooling other than within the GISD.

B

Because the testimony that Barrow cites does not constitute sufficient direct evidence of intent to discriminate based on religion, she must rely on the familiar burden-shifting framework established by the Supreme Court in *McDonnell Douglas.* She first must establish a prima facie case of discrimination. *See Reeves v. Sanderson Plumbing Prods., Inc.,* 530 U.S. 133, 142 (2000). Once she meets this burden, GISD is obligated to produce a legitimate, nondiscriminatory reason for the employment decision at issue. *See id.* This is a burden of production, not persuasion, and involves no credibility assessment. *See id.* Once GISD meets this production burden, the presumption of discrimination disappears. *Id.* at 142-43. Barrow must prove by a preponderance of the evidence that the legitimate reasons offered are not the true reasons but are a pretext for discrimination. *Id.* "The plaintiff may attempt to establish that she was the victim of intentional discrimination 'by showing that the employer's proffered explanation is unworthy of credence.'" *Id.* (quoting *Tex. Dep't of Community Affairs v. Burdine,* 450 U.S. 248, 256, 67 L. Ed. 2d 207, 101 S. Ct. 1089 (1981)). "[A] plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification

is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." *Id.* at 530 U.S. 188. "It is permissible for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation." *Id.* 530 U.S. at 147. "Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive." *Id.* At the summary judgment stage, Barrow need only raise a genuine issue of material fact. *See Tutton v. Garland Indep. Sch. Dist.,* 733 F. Supp. 1113, 1116 (N.D. Tex. 1990) (Fitzwater, J.).

C

The court must first decide whether Barrow has established a prima facie case. To do so under Title VII, Barrow must demonstrate that (1) she was not promoted, (2) she was qualified for the position she sought, (3) she was within the protected class at the time of the failure to promote, and (4) either the position she sought was filled by someone outside the protected class or she was otherwise not promoted because of her religion. *See Rutherford v. Harris County, Tex.,* 197 F.3d 173, 179-80 (5th Cir. 1999) (sex discrimination case) (citing *Bennett v. Total Minatome Corp.,* 138 F.3d 1053, 1060 (5th Cir. 1998)). In its brief in support of its motion for summary judgment, GISD does not argue that Barrow has failed to establish a prima facie case of disparate treatment, but instead assumes *arguendo* that Barrow has. *See* D. Br. at 19. The court will do so as well.

D

Because Barrow has satisfied her obligation to present a prima facie case, the burden has shifted to GISD to produce evidence of a legitimate, nondiscriminatory reason for the employment decision at issue. GISD has met its burden of production by adducing evidence that Dr. Smith's reason for failing to promote Barrow was her choice to educate her children in private school as opposed to public school, not her choice of a religious school in particular. *See, e.g.,* D. App. 211-12, 293. GISD has also produced evidence that Barrow did not receive a promotion because she did not apply for the Assistant Principal position. *See id.* at 220-21.

E

Because GISD has met its burden of production, the inference of unlawful discrimination has disappeared, and Barrow is obligated to introduce evidence that would permit a reasonable trier of fact to find pretext. The court concludes that she has not.

1

Although employees are protected under Title VII from discrimination based on their religious faith, the statute affords no protection from disparate treatment that is based on an employee's desire to educate her children in a private school, even if the school is sectarian. Barrow's deposition testimony confirms that, during a July 30, 1998 meeting, Dr. Smith told her that she would remain ineligible for promotion to middle school Assistant Principal so long as her school-age children attended any private school, or engaged in any type of schooling other

than within the GISD. *See* D. App. 274-78, 284-86, 292-94. Barrow offers no evidence that would permit a reasonable trier of fact to find that Dr. Smith intended to do anything more than invoke a patronage requirement in spite of, rather than because of, her desire to give her children a Christian-based education.

2

Viewing the evidence in the light most favorable to Barrow as the nonmovant, a reasonable trier of fact could find that her failure to comply with any formal application requirement was due to her having received direct communication from Dr. Smith and others associated with the GISD administration that her application would be unsuccessful if she continued to enroll her children in private school. *See, e.g.,* P. App. 2950, 2958-60. Even assuming, however, that Barrow has adduced evidence of pretext relating to her alleged failure to apply for the position,[11] the record still would not permit a reasonable inference of discrimination based on religion in view of the summary judgment evidence that Dr. Smith intended to do no more than impose a patronage requirement devoid of any intent to discriminate based on Barrow's Christian religion or the exercise of her faith. *See Reeves,* 530 U.S. at 148 ("Certainly

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[11] The citations on which Barrow relies to support her arguments under the rubric, "The District's Excuse Is a Pretext for Discrimination [,]" *see* P. Br. 39-40, violate Rule 56.5(c), *see supra* n.4. The citations that she offers as proof of discrete events and conversations direct the court to review segments of the record that consist of groups of 41, 49, 57, 67, 110, 87, and 52 pages, respectively. The final two citations, of one and two pages, respectively, refer to Barrow's affidavit account of her July 30, 1998 meeting with Dr. Smith, and the court has considered and addressed the evidence relating to this meeting. *See supra* § III(E)(1).

there will be instances where, although the plaintiff has established a prima facie case and set forth sufficient evidence to reject the defendant's explanation, no rational factfinder could conclude that the action was discriminatory. For instance, an employer would be entitled to judgment as a matter of law if the record conclusively revealed some other, nondiscriminatory reason for the employer's decision, or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred."); *see also Vadie v. Miss. State Univ.*, 218 F.3d 365, 374 n.23 (5th Cir. 2000) (quoting *Reeves*, 530 U.S. at 148), *cert. denied*, 531 U.S. 1113 (2001).

Because Barrow has not adduced evidence upon which a reasonable trier of fact could conclude that Dr. Smith's failure to promote her was based on her religion or her choice of specifically religious education for children, the court grants summary judgment in favor of GISD with respect to Barrow's claim of disparate treatment.

IV

Barrow also asserts that GISD employment policies have subjected her, and people similarly situated, to disparate impact, in violation of Title VII. *See* P. Br. at 44-46. To establish a prima facie case of disparate impact, Barrow must show that facially neutral employment standards operate more harshly on one group than another. *See Johnson v. Uncle Ben's, Inc.*, 965 F.2d 1363, 1367 (5th Cir. 1992). This initial burden includes proof of a specific practice or set of practices resulting in a significant disparity between the groups. *Id.* Statistical disparities between the relevant

groups are not sufficient. *Id.* A plaintiff must offer evidence "'isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities.'" *Id.* (quoting *Wards Cove Packing Co. v. Atonio,* 490 U.S. 642, 655 (1989)).

Barrow has not furnished evidence of any observed statistical disparities caused by GISD's alleged practice of refusing to promote to administrative positions individuals who choose to educate their children in private school. At most, she has adduced evidence that this requirement was applied to her twice, and to Pope once. *See* P. App. 2948, 2983-84. In response, GISD has introduced evidence that while employed by GISD, Assistant Superintendent Mike Cardwell ("Cardwell") educated his children for twelve years in private school, and during that time was promoted to Assistant Superintendent and served for a time as Interim Superintendent.[12] *See* D. App. 123-29. Taken as a whole, the evidence on which Barrow relies does not satisfy her initial burden of proving that GISD's employment practices have resulted in a significant disparity between Christians and non-Christians, or religious believers and nonbelievers. Consequently, the court grants summary judgment in favor of GISD with respect to Barrow's disparate impact claim.

---

[12] Cardwell's testimony reflects that his children attended the Greenville Christian School – the same school to which Barrow desired to send her children – and that they had graduated before Dr. Smith's tenure as Superintendent. *See* D. App. 123-24.

V

GISD's motion for summary judgment and brief in support demonstrate that GISD has moved for summary judgment only as to Barrow's disparate treatment and disparate impact claims under Title VII. *See* D. Mot. at 1 ("Plaintiff's Title VII claim fails because she cannot produce any evidence to establish that any individual involved in the events in question 'intended' to discriminate against her because of her religion, Christian; nor can she show any facially neutral employment practice of the District that resulted in a burden imposed on her religious beliefs."); *see also id.* at 2 ("Plaintiff cannot meet her burden of proof in any of her 1983 claims or on her Title VII claim (whether she argues it as a disparate treatment or disparate impact claim)."). In her brief in support of her response, however, Barrow argues that GISD is liable under Title VII on the alternate theory that GISD's hiring standards fail to provide "reasonable accommodation" of her religious practices. *See* P. Br. at 32. She also cites the Fifth Circuit standard for establishing a prima facie case on a "reasonable accommodation" theory. *Id.* at 32 n.42 (citing *Jenkins v. Louisiana,* 874 F.2d 992, 995 (5th Cir. 1985)). In its reply brief, GISD does not argue that Barrow has failed to plead this theory in her amended complaint[13] or that she failed to disclose it as a basis for her Title VII claim in response to a proper discovery request. Because the court may not grant summary judgment on a ground that is not included in a summary judgment motion, *see John Deere Co. v. American National Bank, Stafford,* 809

[13] Because the notice pleading standard of Fed. R. Civ. P. 8(a) applies, and since she explicitly alleges a Title VII claim, this argument may have lacked merit had it been made.

F.2d 1190, 1192 (5th Cir. 1987), it concludes that Barrow's reasonable accommodation claim remains in the case.

Before GISD filed its motion for summary judgment, Barrow sought leave to file a second amended complaint. The court denied the motion without prejudice due to the pendency of a motion for summary judgment that Dr. Smith had filed. *See* Dec. 4, 2001 Order at 1-3. It permitted her to move anew for such relief after the court decided the summary judgment motion. *Id.* at 1. Barrow's proposed second amended complaint specifically alleges that GISD did not reasonably accommodate her religious beliefs and practices. *See* P. Prop. 2d Am. Compl. ¶ 11.10. If allowed as a pleading, it would provide GISD fair notice of her intent to assert such a claim. Under these circumstances, the court grants Barrow leave to amend to file a second amended complaint to assert a reasonable accommodation claim, which would then be the sole remaining Title VII claim against GISD.

VI

In its motion for summary judgment, GISD asserts a simple basis for dismissal of Barrow's state-law claims. It maintains that her "pendent state law claims should be dismissed without prejudice, upon dismissal of the substantive federal claims against the District[.]" D. Mot. at 1. Because the court has held that Barrow may proceed with substantive federal claims under § 1983 and Title VII, GISD is not entitled to dismissal on this basis.

GISD's motion and brief indicate that it seeks, in the alternative, summary judgment solely on Barrow's claims for injunctive relief under Texas law. *See id.* at 1; D. Br. at

24. Under Texas law, "[a] successful applicant for [permanent] injunctive relief must demonstrate the following four grounds for relief: 1) the existence of a wrongful act; 2) the existence of imminent harm; 3) the existence of irreparable injury; and 4) the absence of an adequate remedy at law." *Priest v. Tex. Animal Health Comm'n,* 780 S.W.2d 874, 875 (Tex. App. 1989, no writ) (citing *Frey v. DeCordova Bend Estates Owners Ass'n,* 647 S.W.2d 246, 248 (Tex. 1983)). GISD contends *inter alia* that Barrow has failed to demonstrate the existence of imminent harm if an injunction is not granted. Barrow acknowledges that in August 2001 she was promoted to Assistant Principal of Greenville High School. *See* P. Br. 19. She has failed to adduce evidence that demonstrates any potential for imminent harm from continuing violations of state law by GISD. Therefore, the court grants GISD's motion for summary judgment with respect to Barrow's state-law claim for injunctive relief.

VII

In a prior opinion, the court dismissed Barrow's action against Dr. Smith, individually, based on qualified immunity and entered a Rule 54(b) final judgment. *See Barrow v. Greenville Indep. Sch. Dist.,* 2002 U.S. Dist. LEXIS 2792, 2002 WL 255484, at *6 (N.D. Tex. Feb. 20, 2002) (Fitzwater, J.), *appeal docketed,* No. 02-10351 (5th Cir. Mar. 22, 2002). Barrow has appealed the court's judgment, and the parties have requested that the trial of this case be stayed during the pendency of the appeal. Accordingly, within 20 days of the date this memorandum opinion and order is filed, the parties must advise the court by joint written submission whether they request that Barrow's action against GISD be abated pending the outcome of the

appeal. If so, the court will abate this part of the case and statistically close it until the appeal is completed; otherwise, the court will conduct such further proceedings as are consistent with the interests of justice.

* * *

The court grants in part and denies in part GISD's October 9, 2001 motion for summary judgment.

SO ORDERED.

April 17, 2002.

SIDNEY A. FITZWATER

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 05-11151

KAREN JO BARROW

Plaintiff-Appellant

v.

GREENVILLE INDEPENDENT SCHOOL DISTRICT; ET AL

Defendants

GREENVILLE INDEPENDENT SCHOOL DISTRICT

Defendant-Appellee

Appeal from the United States District Court for the Northern District of Texas, Dallas

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(Filed Apr. 12, 2007)

ON PETITION FOR REHEARING EN BANC

(Opinion 2/26/07, 5 Cir., ___, ___ F.3d ___)

Before JOLLY, HIGGINBOTHAM, and DENNIS, Circuit Judges.

PER CURIAM:

(✓) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that

the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Patrick E. Higginbotham
United States Circuit Judge

SCHWARTZ & EICHELBAUM, P.C.
ATTORNEYS AT LAW

June 25, 1999

[Names And Addresses
Omitted In Printing]

Ms. Janice L. Johnson
Investigator
U.S. Equal Opportunity Employment
Opportunity Commission
Dallas District Office
207 S. Houston Street
Dallas, Texas 75202-4726

Re: Charge No. 310 99 0394
Karen Barrow v. Greenville Independent School District

Dear Ms. Johnson:

This letter will serve as the position statement of the Greenville ISD to the charge of discrimination brought by Ms. Barrow.

Facts

Claim: Ms. Karen Barrow, a teacher at Greenville Intermediate School, claims that she was denied a position as Mid-School Assistant Principal on July 15, 1998.

Response: Ms. Barrow never applied for the position of Greenville Middle School Assistant Principal. The District did have an opening for that position, and it is true that Ms. Barrow was not hired for that position. The District hired another current employee, Ms. Susan Crow, for the vacancy.

Greenville ISD divides its student population among nine campuses. There is one High School (grades 9-12), one

Middle School (grades 7-8), one Intermediate School (grades 5-6), and six elementary schools (grades K-4). The District also runs an Alternative School, to which students are assigned for varying periods of time for disciplinary infractions. The majority of the students at the Alternative School are secondary students (grades 7-12).

This decision to hire Ms. Crow as Assistant Principal was arrived at through a process of applications and interviews. The District's administrative staff met on July 13, 1998 to discuss which of the applicants would be interviewed. As a matter of background, the District had filled an elementary school principal position earlier that summer. When the time came to consider filling the Assistant Principal position at the Middle School, the District first considered the unsuccessful applicants for the elementary principal position. Reviewing those applications, the administrative staff created a list of persons to interview for the Middle School assistant principal position.

The list of persons to interview consisted of the following, all of whom had applied for or expressed interest in the elementary principal's position:

> Annie Gulley, a GISD teacher at the Intermediate School with over 17 years experience, 5 of those years in Greenville ISD, and with prior administrative experience in another state;
>
> Julie Mitchell, a Greenville ISD elementary teacher for eight years, with prior experience in another district at the high school level;
>
> Susan Crow, a Greenville ISD math teacher with 11 years experience, all at the secondary school level;

Ken Roberts, a teacher/coordinator at the McKinney ISD Alternative School, recommended by Dr. Thompson, a professor at Texas A&M University;

Sylvia Marks, a teacher at Kaufman High School, also recommended by Dr. Thompson;

Jere Craighead, a teacher/coach at West Mesquite High School; and

Donna Saucier, a counselor at Quintin-Ford High School.

While deciding that these seven individuals would be interviewed, the administrators discussed a "back-up" pool of persons to interview, in case none of these seven was chosen. This "back-up" pool consisted of four other employees of the District who had not applied for the elementary principal position, but were known to have the proper Mid-Management certification (or were in the process of becoming certified) necessary to be employed as the assistant principal at the Middle School.

Persons involved in these discussions were: Dr. Smith, Superintendent; Mr. William Smith, Assistant Superintendent for Administration; Mike Cardwell, Assistant Superintendent for Instruction; James Fuller, Assistant Superintendent for Operations; Ted Warren, business Manager; Joan Graves, Director of Secondary Education, Brad Press, Public Information Officer, and one or two others who were present in the meeting that day.

Assistant Superintendent for Administration William Smith was tasked with speaking to the "back-up" pool candidates, and inquiring as to whether they would like to be considered for the assistant principal position at the

Middle School, assuming the interview pool was expanded to include them.

Following the Interview Committee's meetings with these seven, Ms. Crow emerged as the favorite candidate, and she was offered the position. Ms. Barrow was never formally considered for the position.

Position

Claim: Ms. Barrow contends that she was told she would not be considered for the position of assistant principal at the Middle School unless she moved her children from the private, Christian school they currently attended and enrolled them in the District. She contends in her Charge of Discrimination that Dr. Herman Smith, Superintendent of Schools for Greenville ISD, told her that.

Response: Dr. Smith acknowledges that on July 30, 1998, Ms. Barrow and her husband met with him, and recounted for him the allegation that she was not considered for the assistant principal position because her children attended a private Christian school. Ms. Barrow based this allegation on her conversation with Assistant Superintendent William Smith, when he contacted her to see if she was interested in being considered for the position.

Dr. Smith denies making any statement that Ms. Barrow would not or could not be considered for an administrative position if her children attended private Christian school. Dr. Smith did discuss with Ms. Barrow that the issue of where her children attend school had been discussed by the administrators present in the meeting at which the interview pool and "back up" pool members were selected. Dr. Smith explained that the issue of where her children

attended school was one factor that would be considered if she were interviewed. However, Dr. Smith expressed that this related to the public's perception that highly visible administrators within the District should have their children enrolled in the District, not in other school districts or in private schools.

The District has a policy of objective criteria for personnel decisions, Policy DAB (Local). Under this policy, a host of issues may be considered when making a personnel decision, including education, training, certification, experience, recommendations and references, suitability for the position and professional competence, and the needs of the District.

In the past, public controversy had occurred in Greenville ISD when members of the District's administrative staff enrolled their children in private schools (regardless of whether the private school is affiliated with any particular religious group). Apparently, members of the public who send their children to the public schools have complained or generally expressed dissatisfaction with the District employing administrators who were not perceived to support the District's educational system by their choice to enroll their children in other schools. Dr. Smith and several of the District's other administrators consider this public perception as one factor that needs to be considered under the issue of which applicant best met the needs of the District. The purpose is not to prohibit administrators from practicing their religious beliefs, but to be aware of the possibility that additional controversy could be generated and public confidence in the District's schools could be eroded. However, this would not be a controlling consideration, and indeed, Ms. Barrow was included in the

"back up" pool of persons to be interviewed if none of the primary applicants was selected.

Because a finalist was selected from the primary pool of persons who had actually applied for an administrative position with the District, Ms. Barrow was never considered or interviewed.

The District's position on Ms. Barrow's claim is that the school board has not adopted any policy that would prohibit Ms. Barrow from enrolling her children in a private Christian school. The District has a policy mandating compliance with Title VII, Policy DAA (Legal). Indeed, to this day, her children remain enrolled in the Christian school.

Furthermore, Ms. Barrow was never actively considered for the position of Middle School assistant principal because she has never applied for the position. She was invited to express interest in the position, if the "back up" pool members were going to be interviewed. The District thus was and is willing to consider her for an administrative position. Therefore, she was not discriminated against because of her religion, Christian.

Finally, to the extent that the District's administrators did discuss the enrollment of Ms. Barrow's children in private school, the issue for them was enrollment in the District versus enrollment outside the District – not Ms. Barrow's religious beliefs. At the most, the issue is enrollment in public schools as opposed to enrollment in private school, not enrollment in religious school. In support of its position that this issue is not controlling on the decision of whether to employ a person in a particular administrative position, the District would note that that Ms. Crow, the applicant who was selected for the position in question,

home schools her children, and other District administrators have or had children enrolled in private schools.

Documents

Enclosed with this letter stating the District's position are copies of Polities DAA (Legal, and DAB (Local).

Other documents can be provided such as applications or resumes of other candidates, personnel records related to other candidates, affidavits of administrators involved in the discussions and decisions in question, among others. Please notify this office of what documents would best assist you in your investigation of this claim.

If you need any additional information regarding the District's position, please do not hesitate to call or contact this office.

Sincerely

SCHWARTZ & EICHELBAUM, P.C.

By /s/ Cobby A. Caputo
Cobby A. Caputo
ccaputo@edlaw.com

CAC:kdp

Enclosures

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No. 07-59

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SUPREME COURT, U.S.

In The

Supreme Court of the United States

KAREN JO BARROW,

Petitioner,

v.

GREENVILLE INDEPENDENT SCHOOL DISTRICT, ET AL.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT GREENVILLE INDEPENDENT SCHOOL DISTRICT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DENNIS J. EICHELBAUM
Counsel of Record for Greenville Independent School District
SHARON S. GILMORE
JANICE S. PARKER
SCHWARTZ & EICHELBAUM, P.C.
7400 Gaylord Parkway
Suite 200
Frisco, Texas 75034
(972) 377-7900

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether a state law that designates the Superintendent as the sole authority to *make recommendations* for personnel employment to the school board of trustees, which also grants the board of trustees the right to accept or reject the Superintendent's recommendations, makes the Superintendent a policymaker under 42 U.S.C. § 1983.

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BRIEF FOR RESPONDENT GREENVILLE INDEPENDENT SCHOOL DISTRICT IN OPPOSITION

STATEMENT OF THE CASE

In July of 1998, Petitioner Karen Jo Barrow ("Barrow" or "Petitioner") was employed as a teacher with the Greenville Independent School District ("GISD"). (Pet. App. 2).[1] At that time, GISD had an assistant principal vacancy at the Greenville Middle School. Contrary to the Petition for writ of certiorari ("Petition"), Barrow never applied for the position of assistant principal, but her name was raised by the Superintendent's Council as a possible candidate for consideration for the position. (Pet. App. 2). Even though Barrow had not applied, a senior school official asked Barrow if she would consider transferring her children from private school to the GISD, and she declined. (Pet. App. 2).

Nonetheless, Barrow's name was placed in a pool of applicants. (Pet. App. 2). Following a meeting of the Superintendent's Council, the Assistant Superintendent, at Superintendent Smith's ("Superintendent") direction, spoke with Barrow and confirmed her children attended private school. He asked her if she would consider transferring her children to the GISD; Barrow declined. (Pet. App. 2). After another candidate was selected, the Superintendent told Barrow and her husband that he did not recommend Barrow for the job because her children went to private school; he also stated that Barrow had "no

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[1] Petitioner's Appendix 1-11 is *Barrow v. Greenville Indep. Sch. Dist.*, 332 F.3d 844 (5th Cir. 2003), and is referred to herein either using the Appendix or the name "*Barrow*."

future" at GISD as long as her children did not attend GISD schools.[2] (Pet. App. 2). The candidate the GISD board selected to fill the assistant principal vacancy also did not send her child to GISD or another public school. (Pet. App. 120-121).

Barrow filed suit against GISD and the Superintendent alleging, *inter alia*, that the Superintendent violated Barrow's constitutional rights by refusing to consider, interview, or recommend her to the GISD Board of Trustees unless she enrolled her children in public school. (Pet. App. 88-89). GISD moved for summary judgment, which the District Court granted in-part and denied in-part, holding in relevant part that the Superintendent was not a policymaker for § 1983. (Pet. App. 3).

The remaining claims against GISD and the Superintendent were tried to a jury, which found against the Superintendent and for the GISD. (Pet. App. 3). The Superintendent was ordered to pay Barrow about $35,000 in damages and $650,000 in fees and costs. (Pet. App. 3-4). Barrow appealed the District Court's granting of summary judgment that the Superintendent was not a "policymaker," as well as, her disparate impact claim. (Pet. App. 4). The Fifth Circuit affirmed the District Court's grant of summary judgment to GISD on Barrow's § 1983 claim for which Barrow now petitions this Court for writ of certiorari. (Pet. App. 9).

Petitioner Barrow makes several misstatements of fact in her Petition. The Superintendent did not tell the

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[2] The Fifth Circuit recognized that "GISD disputes many of these facts, but on a motion for summary judgment we resolve disputed facts in favor of the non-moving party, here Barrow." (Pet. App. 2, n. 1).

selected candidate that "the only reason Barrow was not recommended was where she chose to educate her children"; Petitioner fails to even cite to the record where this alleged statement was made. (Pet. 4). Contrary to the misleading nature of the Petition, the only claim Barrow asserted was that she was not considered for the assistant principal vacancy because she sent her children to *private school* as opposed to public school. There was no evidence that religion or the "religious" nature of the private school was considered or related to anyone's actions. (Pet. 3; Pet. App. 2). Every court along with the jury found that the issue involved public versus private school, and that religion was not a factor or even a consideration in this situation. (Pet. App. 3; 10; 16; 17; 20).

In the response to the Equal Opportunity Commission ("EEOC"), the GISD stated that the Board's policy for hiring personnel applied objective criteria that did not include where candidates educate their children (Pet. App. 119); stated Barrow was not selected because it considered applicants first and an applicant was selected (Pet. App. 120); and that many administrators, including the selected candidate, educated their children in non-public schools (Pet. App. 120-121; *see also* 108).

Barrow further mischaracterizes the facts and misleads the Court when she states "Smith violated Barrow's constitutional rights by refusing to recommend her for the promotion position solely because she chose private, religious education for her children." (Pet. 4; Pet. App. 88-89). The Fifth Circuit even found that there "is strong suggestion here that, to the extent there was a Board policy, it opposed patronage," noting that a patronage policy was rejected by the school board, and that the GISD

board had general anti-discrimination policies. (Pet. App. 8, n. 16).

Barrow misstates the facts and state law when she claims that:

> [D]espite the fact that under Texas State law Smith, as the Superintendent, was delegated the sole, final and unreviewable discretion to deny a recommendation to a job applicant seeking a promotion, and once his decision is made, the GISD school board lacks any authority to reverse the decision or influence Smith's recommendation in any way.

(Pet. 5). Moreover, contrary to Barrow's claim, the Fifth Circuit did not hold that "a final decisionmaker is not a final policymaker even if his decision is not contrary to any other existing policy and his decision is unreviewable," and it is unclear where Barrow cites to make such an accusation. (Pet. at 5). These misstatements of fact and misapplications of law are addressed more completely in GISD's Reasons for Denying the Petition.

REASONS FOR DENYING THE PETITION

1. Texas law designates the Superintendent as the sole authority to *make recommendations* for personnel employment to the school board and grants the school board the right to accept or reject the Superintendent's recommendations, leaving the school board the sole policymaker under 42 U.S.C. § 1983.

Petitioner Barrow's premise that a Superintendent's recommendation is without meaningful review and that

the Superintendent is a final authorized decisionmaker under state law is **faulty** and flatly wrong. Under Texas law the superintendent has:

> [S]ole authority to make recommendations to the board regarding the selection of all personnel . . . except that the board may delegate final authority for those decisions to the superintendent . . . [t]he board of trustees may accept or reject the superintendent's recommendation regarding the selection of district personnel. If the board rejects the superintendent's recommendation, the superintendent shall make alternative recommendations until the board accepts a recommendation.

Tex. Educ. Code § 11.163(a)-(b) (Vernon 1995). (Pet. App. 6).[3] The GISD board retained "meaningful review" when it maintained the right to make all final decisions with respect to selection of personnel. The Fifth Circuit correctly held that selecting who will be *recommended* is not a final policymaking decision, as the board of trustees retained the right to reject the recommendation.

In this circumstance, the GISD board undeniably intended to retain policymaking authority with regard to the selection of personnel and not delegate it to the Superintendent. GISD did not delegate "final authority for those decisions to the superintendent," as permitted by Texas law. *See* Tex. Educ. Code § 11.163(a)(1) (Vernon 1995). A recommendation is nothing more than a professional suggestion – the school board retained full authority to

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[3] Barrow does not claim that GISD delegated final authority for selecting personnel; she claims only that the recommendation itself was solely vested in the superintendent's discretion.

reject the Superintendent's recommendation and make the final decision.

At all times the GISD board retained the right to review and reject the Superintendent's recommendation for any reason, including a misapplication of the board's policies for selection of personnel had such an issue been timely raised. Barrow had the right to raise such an issue through the local grievance policy if she had chosen to do so. *See* Tex. Gov't Code § 617.005 (Vernon 1993).[4] The GISD board retained the right to reject the recommendation and could have even fired the Superintendent. (Pet. App. 6).

2. *Monell* was correctly applied by the Fifth Circuit.

The Fifth Circuit's decision does not conflict with other Circuits, and the only way Petitioner Barrow draws such a conclusion is by misapplying *Monell v. Department of Social Services of New York*, 436 U.S. 658 (1978). Barrow cites to *Monell* claiming that the Fifth Circuit limited governmental liability, and that in particular, the GISD can never be held liable for the Superintendent's "acts and edicts" because the Fifth Circuit found he is not a policymaker. Barrow fails to acknowledge that while the District Court and the Fifth Circuit found the Superintendent was not a policymaker, the District Court did not dismiss, and there was a jury trial to determine whether or not the

[4] "This chapter does not impair the right of public employees to present grievances concerning their wages, hours of employment, or conditions of work either individually or through a representative that does not claim the right to strike."

GISD had a *custom or practice* of discriminating against persons based upon where their children attended school. The Superintendent himself stood trial for liability for his actions. (Pet. App. 96-98).

Barrow wants to read and to analyze *Monell* in a vacuum by focusing solely on the policymaker provision to claim that the Fifth Circuit abrogated Barrow's opportunity to hold GISD liable by finding that the Superintendent was not a policymaker. (Pet. App. 7-8). Barrow claims that the Fifth Circuit's approach will "discourage representative democracy" and give elected officials the "incentive to delegate decisions to bureaucrats and never adopt policies constraining them in any way." (Pet. 6). Quite the opposite is the effect of the Fifth Circuit's application of *Monell* and *Praprotnick*.[5] If a party can show that the school board has attempted to insulate itself from liability from constitutional violations, then liability may lie with the school district if a widespread practice exists. *Praprotnick*, 485 U.S. at 127. The District Court permitted Barrow the opportunity to hold the governmental entity liable for a custom or widespread practice, but the evidence at trial was overwhelming that it was neither GISD's custom nor practice to discriminate based upon where an employee or candidate for employment enrolled his or her children for school. (Pet. App. 3; 6-7 n. 14; 96-97).

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[5] *City of St. Louis v. Praprotnick*, 485 U.S. 112 (1988).

3. There is no split among the Circuits in applying *Praprotnick* or *Jett*.[6]

Barrow states that the "question in this case is whether an official is a final policymaker on a particular issue if his or her decision on a particular issue is unreviewable or not subject to meaningful review and does not conflict with any other existing policy." (Pet. App. 8). Such a question is not present and does not arise here because the Superintendent's decision was reviewable and his decision conflicted with the GISD board's employment policies, customs and practices.[7] A *recommendation* is not a *decision*; it has no force and effect. Looking at the Petition's analogy makes it easy to recognize that having the sole authority to make a *recommendation* cannot and should not create liability (it also exemplifies why Petitioner Barrow's argument of no liability is completely flawed):

> Presume a superintendent decided he would never recommend an African American for the position of principal. The school board would review the superintendent's recommendation, and if the school board felt a particular candidate (that happened to be African American) was the best candidate for the position, the board could reject every recommendation by the superintendent until the desired candidate was recommended. Moreover, if it was a custom or practice of the superintendent to never recommend an African American for the position, that

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[6] *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701 (1989).

[7] The GISD board did not choose to delegate such authority as permitted under Texas Education Code § 11.163(a)(1).

> would become a custom or practice imputed on the school district, and the school district would be liable under § 1983.
>
> However, to impose liability on a school district based upon a solitary *recommendation* goes too far. Presume that a school board rejects the superintendent's initial recommendation because they wanted the African American candidate, and the school board eventually selects and hires the African American candidate. Will the school district still be liable because the superintendent initially did not recommend the African American candidate? If the superintendent is a policymaker, then every time he makes a *recommendation* the school district would be liable, even though the school board rejected the recommendation and the final decision was to hire the African American candidate. That is why *Monell* and *Jett* limit § 1983 liability to policymakers – because a school district should not be held liable for a *recommendation* – the school district should only be liable when the recommendation is the result of an unconstitutional custom or practice of discrimination.

Barrow speciously wordsmiths the Superintendent's "recommendation" as a "*denial* of the recommendation," thereby claiming it was unreviewable. (Pet. 10). Barrow states "GISD does not dispute that Smith's *denial* of the recommendation to Barrow was not subject to review by the GISD Board of Trustees, or anyone else, and the Fifth Circuit so held." (Pet. 10, citing Pet. App. 6) (emphasis in original). GISD does dispute such a claim, and the Fifth Circuit never said anything of the sort. While the Superintendent was free to make any recommendation he chose, the Board was free to reject it, and Petitioner Barrow was

free to grieve it, which she failed to do. Barrow's conclusion that "the Board of Trustees is prohibited from interfering with or directing the Superintendent regarding the decision of who to recommend" is without citation and authority. (Pet. 10). In fact, Texas law grants school boards the authority to create employment policies. Tex. Educ. Code §§ 11.163, 11.202(c), 11.151(b), (d) (Vernon 1995). The school board specifically rejected a proposed patronage policy, placing the Superintendent on notice that the school board would not consider such a factor in personnel employment. (Pet. App. 8).

Barrow mischaracterizes and disingenuously misleads the Court when she declares that:

> GISD took the position before the EEOC that [Superintendent] Smith's discrimination against Barrow's choice of education for her children did not violate school district policy and indeed it was GISD's policy concerning the "needs of the district" that led Smith to use Barrow's educational choices for her children as a motivating factor regarding refusing her the "recommendation."

(Pet. 10, citing App. 119). What the GISD's EEOC response actually said was that under the GISD's Policy "a host of issues may be considered . . . including education, training, certification, experience, recommendations and references, suitability for the position and professional competence, *and the needs of the District*." (Pet. App. 119) (emphasis added). The GISD's EEOC response goes on to discuss what Superintendent Smith thought . . . *not what the board thought* . . . and that patronage "would not be a controlling consideration." *Id.* This is a far cry from Barrow's dramatic claim that GISD took the position before

the EEOC that the Superintendent's act was in compliance with GISD's policy.

Without explanation why, Barrow concludes that in the "Third, Sixth, Tenth, and Eleventh Circuits Barrow's claim against GISD would succeed." (Pet. 11). The only cases Barrow's Petition mentioned from those respected Circuits are either wholly distinguishable or consistent with the Fifth Circuit; none of the decisions are contrary.

Kneipp v. Tedder, 95 F.3d 1199 (3rd Cir. 1996), was a state-created danger case, where the police left an inebriated man alone near an embankment (which he fell off), and the Third Circuit found that the District Court must consider whether such a police decision created liability due to the training for handling intoxicated persons. *Id.* at 1213. The Court did not find the officers were policymakers, and in fact examined the custom and policy, and said the individuals would stand trial (as the District Court did in *Barrow*). *Kneipp*, 95 F.3d at 1213-1214.

Even more consistent with the Fifth Circuit's decision is the additional Third Circuit case Barrow cites, *Andrews v. City of Philadelphia*, 895 F.2d 1469 (3rd Cir. 1990). *Andrews* held that:

> When an official's discretionary decisions are constrained by policies not of that official's making, those policies, rather than the subordinate's departures from them, are the act of the municipality. Similarly when a subordinate's decision is subject to review by the municipality's authorized policymakers, they have retained the authority to measure the official's conduct for conformance with *their* policies.

Id. at 1481 (emphasis in original). The GISD had anti-discrimination personnel policies (Pet. App. 8, n. 16), and GISD reviewed the Superintendent's recommendation. Had Petitioner Barrow timely raised the issue at the time the alleged injury arose and claimed an unlawful practice, or even filed a grievance, the GISD board might have rejected the recommendation.

The Sixth Circuit's decision in *Waters v. City of Morristown*, 242 F.3d 353 (6th Cir. 2001) was completely consistent with the Fifth Circuit's precedent. In *Waters*, the Sixth Circuit noted that a policymaker's decisions must be final and unreviewable and not constrained by the official policies of superior officials. *Id.* at 362. Substituting the facts of this case into the *Waters*' analysis would lead to the same conclusion found by the Fifth Circuit.

After arriving at the baseless conclusion that the Third and Sixth Circuits would have found differently than the Fifth Circuit in *Barrow*, Petitioner Barrow then proclaims that the Fifth Circuit's decision basically gives governmental entities a "get out of jail free" card by encouraging them to never pass policies. (Pet. 14, 15). To begin with, GISD *had policies* (even Petitioner Barrow cited to them in her Petition). (Pet. 10, Pet. App. 119). The *lack* of policies would lead to the opposite conclusion. It is more likely a court would conclude that a school board delegated policymaking authority to subordinates by having *less* policy guidance; customs and practice would give rise to even more liability. To the contrary, the *more* policies a district has, the *less* likely they will have liability, because the policymaker might insulate the district through multitudes of policies and prohibitions or processes.

In *Randle v. City of Aurora*, 69 F.3d 441 (10th Cir. 1995), the Tenth Circuit cited several examples of schools not being liable because the school board was the final policymaker. *Id.* at 448-449. However, unlike in *Barrow*, the City Council in *Randle* did not have evidence in the record suggesting the City Council involved itself in the hiring or promotion decisions affecting the plaintiff. *Id.* at 450. Petitioner Barrow indicates the review must be "meaningful" instead of "hypothetical" – in *Barrow* the school board itself reviewed the recommendation, so it was clearly meaningful and not merely hypothetical.

The second Tenth Circuit case Petitioner Barrow cites is *Flanagan v. Munger*, 890 F.2d 1557 (10th Cir. 1989). *Flanagan* involved a police captain's discipline of his officers and the fact that the City Council and City Manager rarely if ever reviewed his decisions. *Id.* at 1569. In *Flanagan*, there was no established procedure for reviewing the police captain's decisions. *Id. Flanagan* is wholly distinguishable from the matter at bar because the Superintendent in *Barrow* made recommendations; the school board then reviewed and made the decisions. The *Barrow* facts would lead to the same result in the Tenth Circuit. *See Ware v. Unified Sch. Dist.*, 902 F.2d 815, 818 (10th Cir. 1990) ("Delegation does not occur when a subordinate's decisions are constrained by policies not of his making or when those decisions are subject to review by the authorized policymaker").

Finally, Petitioner Barrow cites to *Holloman v. Harland*, 370 F.3d 1252 (11th Cir. 2004). Barrow misapplies *Holloman*'s "meaningful review" standard to conclude that it would result in a different outcome for the *Barrow* case. *See id.* at 1292. *Holloman* involved a student that was paddled for allegedly disrupting the pledge during

school. Finding that the paddling was a *fait accompli* by the time the school board heard it under its appeal procedures, the Eleventh Circuit found that was not "meaningful review." *Id.* at 1293. This is not analogous because the GISD board was the one that awarded the position of assistant principal, whereas the principal in *Holloman* not only determined the discipline *but carried it out*, and the limited involvement by the school board was well after-the-fact. A fairer reading of *Holloman* would include the language where it states "A member or employee of a governing body is a final policy maker only if his decisions have legal effect without further action by the governing body . . . and if the governing body lacks the power to reverse the member or employee's decision. . . ." *Id.* at 1292, citations omitted. Following that language from *Holloman* one must assume the school board's right to review, reject or accept the Superintendent's recommendation indicates the governing body has such power.

Petitioner Barrow tries to make hay of the fact that the Eleventh Circuit differentiated *Holloman* from *Denno v. School Board*, 218 F.3d 1267, 1277 (11th Cir. 2000), which held that the principal was not a policymaker because there was meaningful review, whereas in *Holloman* the principal was a policymaker because there was no meaningful review. (Pet. 16-17). It is confusing as to how Petitioner Barrow could find this to be favorable to her own argument. Unlike the principal in *Holloman* whose discipline had no meaningful review because the corporal punishment to the student had been inflicted, *Barrow* involved "finality" and "action" only when the GISD board considered the recommendation. The GISD's board had meaningful review because they had the power to reject what was merely a recommendation; had the GISD timely known that patronage was being

considered to make the recommendations, it could have rejected the Superintendent's practice and reprimanded him, and then directed him to bring forth recommendations without patronage considerations. Prior to that meaningful review, the action complained of – the selection of an assistant principal – had not taken place. Clearly, *Barrow*'s timing and meaningful review is more consistent with the second Eleventh Circuit case Petitioner Barrow cited, *Denno*, 218 F.3d at 1277, where a student's suspension had the opportunity for meaningful review before the action became final – similar to the selection of a new assistant principal to fill the vacancy at Greenville Middle School. *See Holloman*, 370 F.3d at 1293.

Petitioner Barrow cites the above cases, yet never explains why or how they are inconsistent with *Barrow*. She just concludes that there are "remarkable" conflicts and she declares that she would have prevailed in the other Circuits. The Circuits all appear to be consistent, and Petitioner Barrow has not yet cited one among the "literally more than a thousand" cases since 2000 that indicate confusion and the need for further guidance, let alone a case whose analysis where she would have actually prevailed. (Pet. 7).

Lastly, Petitioner Barrow cites to the Fourth Circuit decision in *Riddick v. School Board*, 238 F.3d 528 (4th Cir. 2000), whose ruling was consistent with *Barrow*, claiming that the dissenting opinion by Judge Luttig, if followed, would change the outcome of *Barrow*. (Pet. at 11-12). However, it is more likely that the facts in *Barrow* would have resulted in a unanimous opinion before the Fourth Circuit. The majority in *Riddick* would have still found that the GISD board was the policymaker, as in *Riddick*. Judge Luttig discounted the majority's opinion because he

did not believe they should have limited the term "policy-maker" to the school board when the board retained only "pro forma final review authority" – that is significantly different than the facts here, where the GISD board actually made the final decision. *Id.* at 525-526. In *Riddick,* it was not a school administrator making a recommendation to the school board – Judge Luttig found that the school board had effectively delegated its authority to its subordinates. *Id.* at 527. There is no evidence or even allegation that GISD delegated its authority to select the assistant principal in this case. Moreover, Judge Luttig's main focus in his dissent centered on what he believed to be the "deliberate indifference" by the school board, a factor that was not present in *Barrow.*

Petitioner Barrow tosses around doomsday scenarios right and left, such as without policies "there will be no means under the Fifth Circuit's approach for any person whose rights are violated to seek a judicial remedy." (Pet. at 18-19). Aside from the fact that Petitioner Barrow received a full trial on the issues of "custom and policy," it seems insincere to cry "no remedy" when she was awarded $35,000 in damages plus $650,000 in fees and costs against the Superintendent for the alleged unlawful conduct. Petitioner Barrow dramatically emphasizes over and over again that a *lack of policies* could lead to chaos and anarchy, forgetting that GISD had anti-discrimination. Nothing in the law prohibited Petitioner Barrow from grieving an unlawful practice and the GISD board from considering the grievance on hiring practices, and possibly granting the grievance and directing the superintendent to recommend the most qualified candidate without consideration of where that person's children attended school; compliance with federal law always supersedes state law.

4. Barrow was made whole by the Court's decision against the Superintendent.

Barrow's argument that she was denied some type of right to bring a claim is not simply belied by the fact that she had the opportunity for a trial on the issues of custom and practice against GISD, but she also brought suit against the individual she claimed actually discriminated against her, the Superintendent, where she received a judgment for over $35,000 in compensatory and punitive damages. (Pet. App. 12-13). Even if this Court were to grant the Petition and overrule the Fifth Circuit's decision, *arguendo*, Barrow could not earn *greater* compensatory damages. *See E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 297 (2002). Moreover, the GISD is immune from punitive damages. *See City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 271 (1981). Thus, granting the petition for writ of certiorari will have no true effect on the outcome of this case. Barrow was protected from alleged unlawful discrimination in this situation by having the right to bring her claim against the Superintendent himself, the alleged bad actor.

This Court has noted previously that the best § 1983 deterrence against government employees discriminating is not by maintaining liability on the government, but rather the malicious employee:

> By allowing juries and courts to assess punitive damages in appropriate circumstances against the offending official, based on his personal financial resources, the statute directly advances the public's interest in preventing repeated constitutional deprivations. In our view, this provides sufficient protection against the prospect that a public official may commit recurrent constitutional violations by reason of his office. The

> Court previously has found, with respect to such violations, that a damages remedy recoverable against individuals is more effective as a deterrent than the threat of damages against a government employer.

City of Newport, 453 U.S. at 269-270 (citations omitted).

CONCLUSION

Liability under § 1983 is well established by this Court and consistently applied by the various Circuits. Not one Circuit would have ruled differently than the Fifth Circuit in the *Barrow* case based upon the facts and evidence. The people are protected by § 1983 through *Monell* and its progeny because the government is held liable for its policies, customs and practices, the actions of its policymakers, as well as personal liability for unlawful acts by the actors themselves.

For the foregoing reasons, Respondent GISD asks this Court to deny Petitioner's Petition for writ of certiorari.

Respectfully submitted,

DENNIS J. EICHELBAUM
Counsel of Record
SHARON S. GILMORE
JANICE S. PARKER
SCHWARTZ & EICHELBAUM, P.C.
7400 Gaylord Parkway, Suite 200
Frisco, Texas 75034
(972) 377-7900 phone
Counsel for Respondent, Greenville Independent School District

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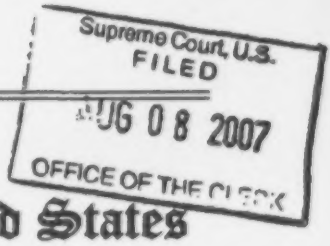
No. 07-59



In The
Supreme Court of the United States

KAREN JO BARROW,

Petitioner,

v.

GREENVILLE INDEPENDENT SCHOOL DISTRICT, ET AL.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITIONER'S REPLY

EDWIN MEESE III,
75th U.S. Attorney General
TODD F. GAZIANO
214 Massachusetts Ave., NE
Washington, D.C. 20002
(202) 608-6181

KELLY SHACKELFORD
Counsel of Record
HIRAM S. SASSER III
LIBERTY LEGAL INSTITUTE
903 E. 18th, Ste. 230
Plano, Texas 75074
(972) 423-3131

WM. CHARLES BUNDREN
WM. CHARLES BUNDREN & ASSOCIATES
5300 Town & Country Blvd.
Ste. 110
Frisco, Texas 75034
(972) 624-5338

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

PETITIONER'S REPLY TO RESPONDENT'S STATEMENT OF CASE

Respondent admits that Superintendent Smith "did not *recommend* Barrow for the job because her children went to private school," Respondent's Brief at 1 (emphasis added) and that "Barrow had 'no future' at GISD as long as her children did not attend GISD schools." *Id.* Respondent also admits that Barrow's suit was based on Superintendent Smith "refusing to consider, interview, or recommend her to the GISD Board of Trustees unless she enrolled her children in public school." *Id.* at 2.

Despite these clear admissions that the action of Superintendent under review was his refusal to "recommend" Barrow for the job "because her children went to private school," and in an attempt to avoid the clear conflict among the circuits, Respondent spends the vast majority of its Brief arguing that the GISD Board maintained the right to "make all final decisions with respect to the selection of personnel." *Id.* at 5. Clearly, they did not. They did not review, nor did they have the authority under Texas law to review – at all – the Superintendent's decision to *refuse* an applicant the "recommendation." App. 6.

Under Texas law, if an applicant wants to pursue employment with the school district, the applicant must first be interviewed by the Superintendent. Then the Superintendent makes a final decision regarding whom to recommend. *See* App. 6; Tex. Educ. Code § 11.163(a)-(b). Finally, the Board of Trustees votes on that recommended applicant – up or down. *See id.* The Board **cannot** vote to approve some other applicant who was not "recommended" by the Superintendent. *See id.* In addition, the Superintendent does not present a slate of applicants. Only one applicant is recommended. If the Superintendent refuses to recommend an applicant to the Board, that applicant cannot be considered by the Board. And because, as the Fifth Circuit stated, this sole authority to recommend comes from the Texas legislature, not the Board of Trustees, the Board is powerless to override the Superintendent's denial of a recommendation even if the applicant files a grievance with

the board. Thus, Respondent's argument that the "board retained 'meaningful review' [to] make all final decisions with respect to selection of personnel," *id.* at 5, is untenable and is merely a desolate attempt to obfuscate the conflict among the circuits.

The Texas Education Code delegates the sole, final and unreviewable discretion to school Superintendents to **deny** a job recommendation, and, under Texas law, school boards lack any authority to review those decisions. *See* Tex. Educ. Code §§ 11.163(a)(1), 11.201(a), and 11.201(d); App. 1-2. It matters not that the board may review a recommendation that **is** made. Barrow's quest for the job ended when Superintendent Smith **denied** her the "recommendation," and Texas law does not provide for any review of that decision.

The Fifth Circuit clearly held that because the school board retains the power under Texas law to enact policies to restrict discrimination by the Superintendent, even if the power is never used, the board is in general the policymaker for the district. This is consistent with the Fourth Circuit approach criticized by Judge Luttig and at odds with the Third, Sixth, Tenth and Eleventh Circuits.

PETITIONER'S RESPONSE TO RESPONDENT'S REASONS FOR DENYING THE PETITION

Respondent's arguments for denying the Petition are based on the erroneous premise that the Texas Education Code grants school boards the right to review decisions of school Superintendents *denying* applicants the "recommendation." That is simply not true.

There are very clear distinctions among the approaches of the Third, Fourth, Fifth, Sixth, Tenth and Eleventh Circuits as outlined in the Petition. In sum, the Fourth and Fifth Circuit's hold that if a government official's decision may be prescriptively constrained by the policy of a board or other official, whether or not any policy to constrain the discrimination is actually implemented prior to the act of the official, such theoretical power is enough to hold that the government official is not the final

policymaker. *See* App. 7; *Riddick v. School Bd.*, 238 F.3d 518, 527 (4th Cir. 2000) (Luttig, J., dissenting) ("the majority mistakenly concludes that a statutorily designated policymaker who retains but pro forma final review authority, is, and can be, the only final policymaker for purposes of municipal liability under section 1983").

In the Fifth and Fourth Circuits, no actual review of the decision is required to avoid § 1983 liability and the Fifth Circuit so stated very explicitly. App. 8-9 n. 17 ("a person is not a policymaker when he makes a decision simply because that decision is unreviewable"). The Third and Sixth Circuits hold that a government official's act binds the governmental entity, i.e. the government official is a policymaker, when the official's act is "unreviewable."[1] The Tenth and Eleventh Circuits require not only reviewability, but "meaningful review" to avoid liability.[2]

Respondent's arguments avoid addressing this conflict and instead retreat to Respondent's erroneous position that the Texas Education Code provides for "review" of a school Superintendent's denial of the "recommendation" because "the school board itself reviewed a recommendation, so it was clearly meaningful and not merely hypothetical." Respondent's Brief at 13. This misses the mark. The board did review a recommendation of another applicant, but the board did not and could not review the denial of the recommendation to Ms. Barrow.

Respondent actually makes the case for granting review on pages 14 and 15 of its brief. Respondent states:

> The GISD's board had meaningful review because they had the power to reject what was merely a recommendation; had the GISD timely known that patronage was being considered to make the recommendations, it could have rejected the

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[1] *Kneipp v. Tedder*, 95 F.3d 1199, 1213 (3rd Cir. 1996); *Waters v. City of Morristown*, 242 F.3d 353, 362 (6th Cir. 2001).

[2] *Randle v. City of Aurora*, 69 F.3d 441, 448-49 (10th Cir. 1995); *Holloman v. Harland*, 370 F.3d 1252, 1292 (11th Cir. 2004).

> Superintendent's practice and reprimanded him, and then directed him to bring forth recommendations without patronage considerations.

Respondent's Brief, pp. 14-15. Respondent, however, did not do this when Ms. Barrow filed her charge with EEOC, when she filed suit, or even to this day. That is the point of conflict. The Fifth and Fourth Circuits hold that the theoretical power to proscribe conduct in the future, even if the power is never used, is enough to hold that the official is not a final policymaker.

Such theoretical power, when it is not exercised in a case, is consistent with the Tenth's holding that "our decisions also underscore that any review procedure or constraints must be *meaningful* – as opposed to merely hypothetical – in order to strip an official of 'final policymaking' authority" (emphasis in original)[3] and that "[f]or all intents and purposes the Chief's discipline decisions are final, and any meaningful administrative review [by the City Council or City Manager] is illusory."[4] And, equally conflicting, the Eleventh Circuit's application of the "meaningful review" standard in *Holloman v. Harland*, 370 F.3d 1252, 1293 (11th Cir. 2004) ("While the student handbook set out an [sic] formal multi-step appellate process that was theoretically available on paper, Holloman could not, as a practical matter, take advantage of it.") is unexplained by Respondent.

Nor does Respondent even attempt to explain how the Fifth and Fourth Circuits are consistent with the approach in the Sixth Circuit which holds that "[t]he authority to exercise discretion while performing particular functions does not make a municipal employee a final policymaker *unless the official's decisions are final and unreviewable and are not constrained by the official policies of superior officials.*" *Waters v. City of Morristown*, 242 F.3d 353, 362 (6th Cir. 2001) (emphasis added). In this case the Fifth

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[3] *Randle*, 69 F.3d 441, 449 (10th Cir. 1995).

[4] *Flanagan v. Munger*, 890 F.2d 1557, 1569 (10th Cir. 1989).

Circuit said "a person is not a policymaker when he makes a decision simply because that decision is unreviewable." App. 8-9 n. 17. Dr. Smith's decision to deny the recommendation to Ms. Barrow was unreviewable as a matter of law. His decision was not actually restrained by any policy on the issue of private school choice. At best, Respondent could have enacted a policy to proscribe such discrimination based upon private school choice in the future. Respondent even failed to do that. Under Respondent's approach, a superintendent could deny every African-American candidate a recommendation. The school district, as long as it had the theoretical power to act, even if it refused to do so, would remain unaccountable.[5]

CONCLUSION

The conflicting approaches and standards used by the circuits to determine when a decision by a public official is a decision of the municipality so that § 1983 liability attaches cannot be ignored. The federal circuits are using different criteria to determine culpability in this important area of the law. The Petitioner's Petition should be granted in order to resolve the conflict and apply the rule of law in a consistent manner.

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[5] GISD suggests in its Response that Barrow's recovery against Dr. Smith in his individual capacity is a full recovery. This is not true. First, Barrow's recovery against Dr. Smith is currently pending on appeal to the Fifth Circuit. Second, there remains an additional independent recovery for Barrow against GISD. Finally, because the court did not allow Ms. Barrow to proceed against GISD on this issue, costs – $14,492.65 – were assessed against Ms. Barrow, a public school employee. App. 13.

Respectfully submitted,

EDWIN MEESE III,
75th U.S. Attorney General
TODD F. GAZIANO
214 Massachusetts Ave., NE
Washington, D.C. 20002
(202) 608-6181

KELLY SHACKELFORD
Counsel of Record
HIRAM S. SASSER III
LIBERTY LEGAL INSTITUTE
903 E. 18th, Ste. 230
Plano, Texas 75074
(972) 423-3131

WM. CHARLES BUNDREN
WM. CHARLES BUNDREN &
ASSOCIATES
5300 Town & Country Blvd.
Ste. 110
Frisco, Texas 75034
(972) 624-5338